Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

WAYNE T. ZIEGLER,

Petitioner,

versus

BANK OF AMERICA

Respondent,

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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201-861-9799

QUESTIONS PRESENTED FOR REVIEW

I. Does a Chapter 7 debtor have standing if scheduled assets exceed creditor claims?

II. Does a Chapter 7 debtor have standing when they re-open their case, file amended asset schedules, and a trustee is not appointed?

III. When a defense is decided against a defendant in a prior action, are they estopped from asserting the defense again in a subsequent federal action?

IV. Did the Ninth Circuit err in finding the petitioner's conspiracy to produce forged bank statements cause barred by the civil RICO dismissal in Case 95-2706GHK?

V. Does the California Vexatious Litigant Statute (California Code of Civil Procedure §391 et al) violate the 14th Amendment guarantee of equal protection of the law?

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The opinions and orders in this case have not been published. The Memorandum Opinion and Judgment of the court of appeals appears in the Appendix to this petition(1a-3a)[1]. The order denying the petitioner's request for re-hearing en banc is in pages 29a-30a. The Memorandum Opinion and Order of the district court (Civil 00-0188 CW) are in pages 4a-28a.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 2004. The Petitioner's request for rehearing en banc(31a-47a) was denied on July 27, 2004. On October 18, 2004, Justice O'Conner extended the time within which to file a petition for a writ of certiorari to and including November 24, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides that no state shall, "deny to any person within its jurisdiction the equal protection of the laws".

STATUTES INVOLVED

Petitioner's writ challenges the California Vexatious Litigant statute(California Code of Civil Procedure §391 et al) as violative of the constitutional provision cited above, and, accordingly, 28 U.S.C. §2403(b) may be applicable. This challenge was in the prayer for relief in the complaint filed in this action. The California Vexatious Litigant Statute is re-printed in the appendix(199a-203a).

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[1] The references to the appendix are to the specific pages included in the cited exhibit, or, where applicable, a particular subset of pages therein.

STATEMENT OF THE CASE

In July, 1959, at the age 6, the petitioner made a goodwill visit to a mental hospital in Watsonville, California, and met a 30 year-old male adult who had assaulted a Bank of America employee, and been given an indeterminate criminal sentence. The petitioner concluded that indeterminate sentences were unconstitutional(52a-60a).[2]

Doctors in Santa Cruz, incensed by the petitioner's opinion on indeterminate sentences, kidnapped his collie, Bell, two weeks before Christmas, 1959, and threatened to kill her unless he wrote a song. To expose the doctors' conduct, the petitioner wrote a poem titled, Tender Bell (68a), which resulted in Bell being returned to the family who had adopted her before the kidnapping(61a-64a).

In May, 1960, Bank of America sent a representative into the petitioner's public school to request that he disavow authorship over the poem, to which the petitioner agreed(64a-66a). Thereafter, the bank promulgated in its organization the belief that the petitioner intended to sue the bank to force the bank to change its insurance practices related to secured collateral.[3]

In November, 1970, the petitioner opened a checking account with the bank, and in May, 1971, met with an attorney from the bank's Legal Department and the Corte Madera branch manager. When the petitioner refused to condone that the bank had the legal right to take a borrower's collateral when a claim arose under bank-ordered insurance, the attorney communicated the threat, "the bank will interfere in your business career in every way possible"(66a-67a).

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[2] The prisoner's sentence had no maximum end date, i.e., it was indefinite. The petitioner believed such a sentence was cruel and unusual punishment and analogous to locking a disobedient child in a room and throwing away the key.

[3] The common bank practice in the 1960's when a claim arose under bank-ordered insurance was the bank would repossess the vehicle, and sell the vehicle for the loan balance.

On January 30, 1981, the petitioner opened a checking account with the bank's Pacific-Harding branch in Stockton.[4] The branch manager closed the account and refused to return the balance of $1079.70. The petitioner opened a checking account at the bank's Arden-Ethan branch in Sacramento on March 3, 1981, to resolve the dispute.

On May 1, 1981, the petitioner signed a stipulation to an account stated for the Pacific-Harding account and the bank transferred the funds to a new account 12252-01737 the petitioner opened with the Kettleman Lane branch in Lodi on May 27. The petitioner was given a supply of 94 checks for the Arden-Ethan account numbered from 107-200, and cashed check 107 on said date for $100.00.[5]

On July 16, petitioner consummated a loan 1074-7229 with the bank's Lodi Main branch to finance the purchase of a sailboat and a trailer. Bank employees vandalized the sailboat twice to create a litigatable issue involving the bank's insurance. Petitioner entered into daily settlement discussions with the bank's Legal Department on January 18, 1982, which lasted until May 9, 1982.

As petitioner did not believe he could safely keep funds in a smaller branch, he opened a checking account with the Stockton Main branch on January 28, 1982. At the manager's request, petitioner opened a second account 01547-53308 on February 26, after the first account was impacted by unauthorized ATM entries. Petitioner closed the second Stockton Main account in early January, 1983.

The petitioner received an employer advance for $3,975 to hire an attorney which he deposited in the Arden-Ethan account on February 19, 1982,. Thereafter, the manager advised petitioner that the bank had frozen the account because unauthorized postings had been made to the account.

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[4] All cities named in this writ are in California, with the exception of Houston, which is in Texas.

[5] Check 107 is the first check shown as paid on the forged Lodi Main statement production mailed to petitioner in August, 1988.

About April 15, 1982, the petitioner and the bank's management agreed to the terms of an out-of-court settlement. Both parties agreed to continue the banking relationship in good faith. The bank agreed to cover the cost of repairs caused by the second vandalism, and agreed to self-insure the sailboat for any damage not covered by a bank policy to prevent a re-occurrence of the wrongful conduct that had occurred in 1981. The petitioner also agreed to maintain a full banking relationship with the Lodi Main branch beginning in June, 1982.

At the Legal Department's request, the petitioner opened an "interim" checking account 1072-03334 with the Lodi Main branch on April 21, for processing confidential settlement transactions. The petitioner was supplied checks pre-numbered from 201-275 for the account.

On June 3, 1982, the petitioner opened a permanent Timesaver checking account 1072-03354 with the Lodi Main branch, and ordered checks numbered 101-275, and elected to wait 6 months before obtaining an ATM card for the account. Petitioner also consummated loan 1074-8226, but objected to how the bank had chosen to describe its promise to self-insure the sailboat in the agreement.

On July 9, 1982, the petitioner consummated a superseding loan agreement 154-83308 with a term of 5 years and note amount of $6,400.[6] Loan proceeds paid off the petitioner's 1981 loan. The bank's Legal Department kept the only copy of the 154-83308 loan agreement in its workfile on the settlement. The petitioner genuinely believed the bank would not create any more litigatable issues over the remainder of the banking relationship.

In September, 1982, petitioner agreed to the Lodi Main branch manager's request to disable the "Customer Since 1982" description from printing on the Lodi Main acount

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[6] The bank referred to its obligation to self-insure the sailboat in the language of the security agreement, stating, "and naming as the insured, you and me, or you only," by circling and crossing out the words, "or you only."

bank statements.[7] In December, the manager persuaded the petitioner to convert the account to a fixed monthly service fee, and to accept an ATM card for the account.

On bank statements mailed between February, 1983, and May, 1984, the bank posted over $4,500 in unauthorized ATM entries to the Lodi Main account. In March, 1983, the bank finally credited $6,000 of a $7,000 deposit made in September, 1983, and offset the funds by posting fraudulent checks numbered from 326 to 350 to the account which the petitioner had not yet written.[8]

The petitioner reported these wrongful actions to the Lodi Main branch manager after receiving each monthly bank statement. In May, 1984, the petitioner hired an attorney in Lodi, Mr. Barkley, to initiate suit on the issues. In response to Mr. Barkley's intervention, the bank's Legal Department restored the Lodi Main account to a Timesaver account(the bank had changed the account to a regular checking account in January, 1984), to return paid checks with the bank statements, to investtigate all disputed ATM entries and credit the account within 90 days, and to supply copies of paid checks numbered between 326 and 350. The Legal Department also promised to supply the withheld Arden-Ethan branch bank statements for March - June, 1982, which the bank had never mailed to the petitioner.

As the petitioner expected his sailboat might become a target for reprisals if suit were initiated, the petitioner asked the Stockton Main branch in June, 1984, to order insurance made available under the loan agreement to invoke the bank's duty to self-insure any damage not covered by the bank's insurance. The bank mailed notices

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[7] Petitioner saw no malintent in this request at the time, in hindsight, this action is what permitted the bank to create the forged bank statements for Lodi Main account 1072-03354.

[8] Given the court's page limits, the petitioner is not able to fully describe all of the wrongful conduct the bank engaged in on checking accounts maintained during the bank relationship.

in October, 1984, confirming the order of insurance from Transamerica Insurance Company.

In October, 1984, the petitioner also began employment in San Francisco and on November 2, 1984, opened checking account 2552-09736 with the Noe Valley branch to resolve the bank's fraudulent conduct committed on the Lodi Main account through a neutral branch.

In mid-December, bank employees deliberately sank the petitioner's sailboat by disabling the batteries supporting the automatic bilge pump, and filling the boat with water from a hose. Petitioner learned of the sinking on January 2, 1985. The bank also cancelled the insurance policy ordered on the sailboat through Transamerica.

In mid-January, 1985, the bank's Legal Department agreed to reinstate the Transamerica policy and process a claim in good faith if the petitioner would order a new policy with Farmers Insurance. Petitioner agreed to close his first account and opened a new checking account 2553-09736 with the Noe Valley branch on January 17, 1985. Petitioner was given 30 blank checks which he numbered greater than 9000. The Legal Department also promised to supply the withheld Arden-Ethan account bank statements by the end of the claim process.

Petitioner purchased a new policy on the sailboat from Farmers Insurance on January 17, 1985, and received a notice of reinstatement from Transamerica shortly thereafter. On April 6, 1985, petitioner received an insurance claim check from Farmers for $4,806.71. Since Farmers had no contract obligation to cover the loss in December, 1984, the petitioner deposited the claim check to document the bank's attempt to avoid its contract obligation, and mailed Check 9395 for $4,806.71 back to Farmers, with a letter advising that Farmers was not obligated to cover the sinking of the sailboat. Check 9395 was shown as paid on the May 15, 1985, Noe Valley account bank statement mailed to the petitioner.

In January, 1985, the bank's Legal Department had unilaterally changed the petitioner's loan number from

154-83308 to 1291-5-65269, which was the loan paid in full in July, 1982. The fraudulent loan 1291-5-65269 file was transferred to the bank's Fresno Dealer Loan Center.

In August, 1985, petitioner relocated to Los Angeles. On August 14, 1985, the bank mailed a letter reflecting Transamerica claim proceeds of $8,374 and a fraudulent outstanding balance of $7,730.05, when loan 154-83308 had been overpaid paid by $598.00 by the claim proceeds. On September 10, 1985, a bank manager advised the petitioner that the bank would not honor the self-insurance obligation in the 154-83308 loan agreement.

On September 11, petitioner opened a Versatel checking account 05646-03919 with the Downey-Paramount branch. Beginning on November 15, 1985 and continuing through April 15, 1986, the bank continued to deduct fraudulent loan payments of $183.50 under loan 1291-5-65269 from the Downey-Paramount branch account.

The petitioner consulted with a bankruptcy attorney, who advised the petitioner to file a Chapter 7 petition to discharge the bank's fraudulent 1291-5-65269 loan balance, but to not list the embezzled funds on his asset schedules since he had no proof to support the claims and, if listed, the bank could unfairly compromise the claims. The attorney also advised the petitioner to re-open his bankruptcy case, preferably within a year of the discharge, after he had documented his adversarial relationship with the bank, and to then bring the embezzled funds to the attention of the Chapter 7 trustee.

Subsequent to filing the petition on April 16, 1986, the I.R.S. filed tax claims for 1981-83 when the petitioner's tax records showed these years paid in full, suggesting the bank had not honored checks shown as paid on the bank statements. The bank was able to conceal this misconduct from the petitioner by virtue of keeping the paid checks on the petitioner's accounts. The order of discharge was entered on September 30, 1986.

In June, 1986, petitioner rented a self-storage locker in Los Angeles, after being informed that the business did

not have a relationship with the bank. In August, 1987, the business held an illegal auction sale to conceal the theft of the estate's original banking records.[9]

The petitioner commenced his first suit against the bank in the Sacramento Superior Court on March 16, 1988(Case 501388), stating a timely negligence action arising from the bank's handling of the 1985 insurance claim process. Petitioner served subpoena duces tecum on the bank for loan and bank statement copies for his accounts with the Lodi Main and Stockton Main branches.

In August, 1988, the bank supplied forged bank statements for Lodi Main account 1072-03354, which had 215 duplicate numbered checks from other accounts the petitioner had maintained in 1981 and 1982.[10] The petitioner filed a better prepared complaint in the San Francisco Superior Court in August, 1988, which the bank demurred to on the grounds of another action pending, which petitioner did not oppose, and the court granted.[11]

When the petitioner refused to execute a stipulation to an account stated for the forged Lodi Main production, bank counsel brought a motion to dismiss the Sacramento action before the petitioner could file an amended complaint, distorting the facts into a personal injury cause subject to a one-year limitation statute. The trial court granted the motion and advised the petitioner he could re-file the amended complaint as a new proceeding.

The petitioner relocated to Los Angeles to re-open his

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[9] In October, 1991, petitioner discovered a company check in a partnership dissolution action filed in L.A. Superior Court proving the business had a checking relationship with the bank.

[10] The production failed to include the Custodian of Records' affidavit of authenticity required by California Evidence Code §1561(a), without which the statements are not enterable into evidence pursuant to California Evidence Code §1562.

[11] The petitioner filed the San Francisco action with 3 causes of action because he expected the bank would obstruct his efforts to file an amended complaint in the Sacramento proceeding.

bankruptcy case, and on September 7, 1989, filed a complaint stating timely causes arising from the bank's handling of the claim process in 1985 as L.A.S.C. Case C736722. The bank demurred on the fraudulent grounds of res judicata which the trial court granted, and the petitioner appealed(Appeal B048869). The Court of Appeals, Division Three reversed(124a) with directions(133a).

In June, 1990, the petitioner requested bank statement copies for the Noe Valley and Downey-Paramount branch accounts. In August, the bank supplied forged statement copies for Noe Valley account 2553-09736, and claimed no records existed for the Downey-Paramount account.[12]

On August 21, 1990, the Bankruptcy Court granted the petitioner's motion to re-open his bankruptcy case, and he filed amended asset and liability schedules which were served on the Office of the U. S. Trustee. In September, the petitioner mailed a letter to the Office requesting that a trustee be appointed(70a). In November, the Office advised the petitioner that a trustee would be appointed after the funds were recovered and that the debtor had standing to pursue the litigation pursuant to this Court's decision in *Johnson v. Collier,* 222 U.S. 538 (1912).

On March 14, 1991, petitioner filed suit on the conspiracy to produce forged bank statements in the Bankruptcy Court(AD91-61032JD). Bank counsel submitted a $5,000 nuisance settlement offer to the original trustee(72a). The petitioner served deposition notices on the bank which he withdrew after discovering errors on two notices, as confirmed in a letter to bank counsel(74a).[13]

After the trustee rejected the settlement offer for lack of jurisdiction, bank counsel filed a motion for a protective order imposing a fraudulent objection to the debtor's standing. At hearing, bank counsel falsely accused the

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[12] The forged Noe Valley statement production includes checking activity from Noe Valley account 2552-09736 and Downey-Paramount account 05646-03919.

[13] In copying an afternoon deposition notice, petitioner failed to change the PM designation to AM for 2 morning depositions.

petitioner of engaging in misconduct and successfully mislead the Court to believe a trustee had been assigned. The Court asked the petitioner to have the trustee mail a letter to the Court explaining the trustee's position and granted the motion(79a-86a). The original trustee, Ms. Loder, mailed a letter to the Court a confirming a trustee had not been appointed(77a).

The petitioner filed a motion to vacate the protective order, and at hearing bank counsel persuaded the Court to abstain, and the Court directed the petitioner to pursue the estate's claims in state court(87a-93a). The Court subsequently entered an order vacating the order reopening the bankruptcy estate, the order also stating the debtor could continue to pursue the litigation(94a-95a).

The petitioner refiled the suit on July 29, 1991 in Los Angeles Superior Court(Case BC033836).[14] The petitioner served requests to inspect check copies which would prove both statement productions to be false evidence.

Bank counsel, knowing Causes I-III of the complaint were estate causes of action, brought a motion to declare the petitioner a vexatious litigant so the bank's responses to discovery could cite the stay provision as a grounds for not complying(96a-104a). Bank counsel falsely accused the petitioner of engaging in misconduct in the prior action, and deliberately misrepresented that the Bankruptcy Court had entered the protective order based on a finding of misconduct when the hearing transcripts clearly showed the Court granted the motion based on a frivolous objection to debtor's standing. The motion(105a-115a) was defective as filed as there was no showing required by C.C.P. §391.6, that the petitioner lacked a reasonable probability of prevailing on the four causes of action.

The trial court granted the motion and ordered the petitioner to post $25,000 security and dismissed the suit when security was not posted(120a-124a). The petitioner

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[14] The petitioner also named the bank's Director of Litigation, Mr. Winslow Christian as a co-defendant, who was also served.

filed Appeal B065122 from the dismissal[15].

The bank brought a vexatious litigant motion in Case C736722, which also failed to show the petitioner lacked a reasonable probability of prevailing(116a-119a). The Court dismissed that case when petitioner did not post $10,000 security, and petitioner filed Appeal B071580.

After briefs had been filed, the petitioner consolidated all three appeals in Division Three. On October 6, 1994, Division Three upheld the dismissal in Case C736722 and failed to review and decide the two appeals in Case BC033836 (134a-153a). The petitioner brought this omission to the Court's attention in a petition for rehearing (154a-176a), which the Appeals Court denied.

While the appeals were pending, the petitioner discovered, in January, 1993, an original Timesaver statement for Lodi Main account 1072-03354 that proved the 1988 statement production was false evidence[16]. In February, 1993, the petitioner was hired in a Bank of America facility in Glendale, and was converted to a permanent employee in August, 1993. Petitioner opened an employee checking account. Upon receipt of the first statement bearing the description, "Customer Since 1993", petitioner identified both forged statement productions failed to reflect this description. While employed, petitioner discovered facts that allowed him to explain how bank employees had created both forged statement productions.

With the original Timesaver statement to use as a template, the petitioner reconstructed the first 6 months of statements received on Lodi Main account 1072-03354, and the statements for other checking accounts maintained in 1981 and 1982 by April, 1995.

On April, 24 1995, petitioner filed an action in the California Central District(Case 95-2706GHK) on the be-

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15 The petitioner also filed Appeal B064366 from the trial court's denial of the petitioner's motion to compel discovery.

16 The statements supplied in 1988 are not printed copies of the Timesaver bank statement mailed to the petitioner on Lodi Main account 1072-03354.

lief the District Court had jurisdiction over actions to recover estate funds based on 28 U.S.C. §1334(e). In addition to causes to recover funds in the Arden-Ethan and Lodi Main accounts, the petitioner also stated a civil RICO cause alleging the bank had engaged in a scheme to deprive the estate of funds in Lodi Main account 1072-03354 by obstructing the petitioner's discovery of the Lodi Main account signature card that would have proven the 1988 forged statements produced for the account were false evidence. The cause alleged 3 acts of fraud committed using the U.S. mails:

1) The Lodi Main forged statement production the bank supplied in August, 1988;
2) The bank's motion for a protective order filed in the Bankruptcy Court action imposing a fraudulent objection to the debtor's standing to avoid production of the Lodi Main signature card;
3) Bank counsel, Ms. Young's January 8, 1992 letter promising inspection of signature cards at hearing on January 10, 1992, which bank counsel repudiated upon seeing the court's tentative ruling granting the bank's vexatious litigant motion on said date.

The Court ruled that the 1988 forged Lodi Main statement production was the only act of mail fraud, and therefore the civil RICO cause was time barred. The Court dismissed the other state law causes for lack of "in rem" jurisdiction(185a-190a).

The petitioner completed reconstructing his bank relationship in May, 1996, and filed a motion to recall the remittitur in Appeal B065122, which the Appeals Court denied(177a). The petitioner relocated to Houston, Texas, and on May 1, 1997, filed suit in the U. S. District Court in Houston, Texas(Case H97-1492). Bank counsel moved to dismiss based on res judicata which the trial court granted(178a-183a). The petitioner appealed to the Fifth Circuit Court of Appeals, which upheld the dismissal on

the alternative grounds the causes were time-barred under Texas law(182a-184a).

PROCEEDINGS IN THE TRIAL COURT BELOW

Petitioner re-filed suit on the conspiracy to produce forged bank statements on January 18, 2000, in the District Court in San Francisco (Case 00-0188CW). The bank moved to dismiss based on res judicata citing the Houston action dismissal, which the trial court denied.

The bank brought a second motion to dismiss, which the trial court granted in part. The trial court found that Causes I-IV to recover funds were not time-barred pursuant to Cal. Code of Civil Proc. §348, and that Cause V alleging the conspiracy to produce forged bank statement was also not time-barred, and that causes VI-VIII were subject to the immunity in California Civil Code §47.

The trial court granted petitioner's request to replead Cause VI as a civil RICO cause. Petitioner filed a FAC on July 11, 2002. The bank filed a motion to dismiss, claiming the petitioner lacked standing because the Bankruptcy Court had vacated the order re-opening the estate, that the civil RICO dismissal in Case 95-2706GHK barred the conspiracy to produce forged bank statements, and that the civil RICO cause was time-barred. The court granted the motion, finding the petitioner did not have standing because the estate funds had not been abandoned to the debtor, that the conspiracy cause was barred because it had not been raised in the Case 95-2706GHK, and that the civil RICO cause was time-barred(4a-29a).

The Ninth Circuit Court of Appeals erroneously affirmed the trial court judgment that the petitioner lacked standing, and the dismissal of the civil RICO cause on the alternative grounds of res judicata, but did not uphold the dismissal of the conspiracy to produce forged statements cause because it had not been raised in Case 95-2706 GHK, but because it was "identical" to the civil RICO cause raised in the Central District action(1a-3a).

REASONS FOR GRANTING THE PETITION

I. DOES A CHAPTER 7 DEBTOR HAVE STANDING IF SCHEDULED ASSETS EXCEED CREDITOR CLAIMS?

Petitioner cited a case in appellant's brief holding a debtor had standing to object to a creditor claim when he had a potential pecuniary interest in the estate, *In Re Gulph Woods Corp.* 116 B.R. 423 (Bkrtcy E.D.Pa 1990).

The petitioner's most recent asset and liabilities schedules filed in the trial court(191a-192a) document the estate's claims to deposited funds totals $39,531.12, while creditor claims total $25,233.04. The petitioner has a pecuniary interest of $14,298.08 in the estate.

The Ninth Circuit failed to address this question in its decision. The petitioner is hopeful that the Supreme Court would consider this question worthy of review.

II. DOES A CHAPTER 7 DEBTOR HAVE STANDING WHEN THEY RE-OPEN THEIR CASE, FILE AMENDED ASSET SCHEDULES, AND A TRUSTEE IS NOT APPOINTED?

As explained in the Statement(infra, pg. 9), the petitioner reopened his bankruptcy case in 1990, served amended schedules on the Office of the U. S. Trustee, and the Office chose not to appoint a trustee.

Bank counsel asserted in the trial court and on appeal that the Bankruptcy Court's subsequent vacating of the order reopening the estate nullified petitioner's filing of amended schedules, without citing any supporting case. Even if construed as true, the Court's action did not nullify the decision of the Office of the U. S. Trustee not to appoint a trustee to pursue the claims.

In the January 30, 1992 order vacating the order reopening of the bankruptcy case, the Honorable Judge Dooley expressly stated(94a-95a):

"4...and allow the debtor to continue to litigate against the Bank of America in the state courts, if he desires todo so."

The Ninth Circuit has addressed this question in *Cusano v. Klein* 264 F.3d 936 (9th 2001), holding a debtor has standing to pursue pre-petition claims when they re-open their bankruptcy case, schedule the claims, and obtain Bankruptcy Court approval to pursue the claims. The appeals panel failed to follow this rule even though the petitioner had satisfied all of these requirements.

The petitioner has relied on the advisement of the Office of the U. S. Trustee in November, 1990, that the petitioner has standing pursuant to *Johnson v. Collier (supra)*, since first filing suit in the Bankruptcy Court. In *Johnson(supra)*, this Court held that a debtor has standing to pursue unabandoned estate claims in the absence of action by the trustee, since estate creditors would benefit from the debtor's pursuit of such claims.

In *Meyer v. Fleming*, 327 U.S. 101 (1946), this Court cited the Georgia Supreme Court decision in *Griffin v. Mutual Life Ins. Co., of New York* 46 S.E.870 (1904) which held that a debtor has standing to pursue estate litigation when a trustee is not appointed.

Petitioner cited *Johnson(supra)* in support of standing in the trial court, appellant's brief and his petition for rehearing(33a-35a). The trial and appeals court failed to follow this binding decision of the Supreme Court.

The Appeals Court ruled that petitioner lacked standing because the funds where not scheduled when the petition was first filed in 1986(1a). As petitioner has explained in the Statement(infra, pg. 7), he followed an attorney's advice not to disclose claims he could not support. Had the claims been listed, the bank would have filed the same nuisance settlement it submitted in 1991 after the estate was re-opened, which could have caused the estate creditors to forfeit $34,000.00 of funds on deposit(infra, pg. 9-10).

The petitioner is not aware if this Court has reviewed the question presented and believes it would be beneficial to other debtor's to have their rights known if they reopen a bankruptcy estate to file amended asset claims.

III. WHEN A DEFENSE IS DECIDED AGAINST A DEFENDANT IN A PRIOR ACTION, ARE THEY ESTOPPED FROM ASSERTING THE DEFENSE AGAIN IN A SUBSEQUENT FEDERAL ACTION.

In *Chicot County Dist. v. Bank* 308 U.S. 371 (1939) this Supreme Court established the rule of law that a defendant is barred from raising a defense that could have been asserted in a prior action. The petitioner believes this federal rule is congruent with the rule in 50 Corpus Juris Secundum §774[17] that a defense decided against a defendant in a prior action may not be asserted again in a subsequent proceeding

As explained in the Statement(infra, pgs 11-12), the petitioner stated a civil RICO action in Case 95-2706GHK alleging a scheme to deprive the estate of funds in Lodi Main account 1072-03354. The cause alleged three acts of mail fraud. The trial court ruled the Lodi Main forged production was the only act of mail fraud and the cause was therefore time-barred.

After reconstructing his entire banking relationship, the petitioner moved to Houston, Texas and on April 29, 1997, commenced suit in the U. S. District Court, Texas Southern District(Case 97-1492), stating the same state law causes as in this action. The petitioner's conspiracy to produce forged bank statements cause alleged the same 3 overt acts in furtherance of the conspiracy alleged in L.A.S.C. Case BC033836:

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[17] 50 Corpus Juris Secundum §774: Matters of defense adjudicated against the defendant in a previous action may not again be setup by the defendant either as a defense in further litigation or as the basis of a new action by him or her against the former plaintiff.

1) The unlawful conversion of the debtor's bank records in August, 1987 by agents of B & A Self-Storage;
2) The Lodi Main forged statement production supplied in August, 1988;
3) The Noe Valley forged statement production supplied in August, 1990;

The bank moved to dismiss the Houston action and the trial court erroneously dismissed the suit solely on the grounds of res judicata(178a-181a). The petitioner filed Appeal 98-20583 in the Fifth Circuit Court of Appeals. In his reply brief, petitioner explained how the civil RICO cause and the conspiracy to produce forged bank statements had one common act, the forged Lodi Main production, and therefore the causes of action were not the same.

The 5th Circuit Court of Appeals did not affirm the trial court dismissal on res judicata grounds, but rather upheld the causes as time-barred under Texas law(182a-184a). The policy of all Appeals Courts is to uphold a trial court decision when there is factual support for doing so. As the 5th Circuit found no merit in the claim that the civil RICO dismissal barred the petitioner's conspiracy to produce forged bank statements cause, the court's decision is a determination against the defendant on that defense.

The petitioner raised applicability of 50 C.J.S. §774 to the bank's res judicata defense in his trial court opposetion, appellant's reply brief on appeal, and in the petitioner's petition for re-hearing en banc (35a-36a). The Ninth Circuit elected not to address this question in its decision.

The purpose of 50 C.J.S. §774 is to reduce demands on the court systems, as well as to prevent conflicting decisions between two courts on the same question of law. Both purposes are constructive. The petitioner believes that this Supreme Court would want to decide a question such as this to prevent the federal Courts of Appeal from creating conflicting decisions such as that which is presented to the Supreme Court in this writ of certioari.

IV. THE NINTH CIRCUIT ERRED IN FINDING THE PETITIONER'S CONSPIRACY TO PRODUCE FORGED BANK STATEMENTS CAUSE BARRED BY THE CIVIL RICO CAUSE IN CASE 95-2706GHK

The Ninth Circuit stated, erroneously, in its opinion that the civil RICO claim in Case 95-2706GHK and the conspiracy to produce forged evidence were "identical"(2a-3a). Two causes of action are identical when the same evidence proves both causes of action. The evidence proving the civil RICO cause, as shown in petitioner's reply brief and petition for re-hearing is listed below(36a-37a):

1) The 1988 forged Lodi Main statement production;
2) The bank's motion for a protective order in the Bankruptcy Court case imposing a fraudulent objection to the debtor's standing to obstruct discovery;
3) The Bankruptcy Court order granting the motion;
4) Ms. Young's January 8, 1992, letter promising to allow inspection of signature cards on January 10, 1992;
5) The original July 16, 1984 Timesaver bank statement proving the 1988 forged bank statements were not printed copies of the bank statements mailed to the petitioner;
6) The reconstructed Lodi Main bank statements for the first 6 months the account was open filed as exhibits in support of the complaint in the court record;
7) The petitioner's declaration supporting Lodi Main account 1072-03354 explaining how the account was opened on June 3, 1982, and how the 1988 forged statement production had activity from other accounts before that date;

This evidence **does not prove** the conspiracy to produce forged bank statements for the Lodi Main and Noe Valley accounts. To prove the conspiracy to produce forged evidence cause, the petitioner had to reconstruct his entire banking relationship through April, 1986. The additional evidence required to prove the conspiracy to produce forged statements is listed below(38a-40a):

1) The reconstructed bank statements for the five other checking accounts whose checking activity was reflected on the 1988 forged Lodi Main statement production:

a) Arden-Ethan account 08090-02646; b) Stockton Main account 02552-09736; c) Stockton Main account 02553-09736; d) Kettleman Lane account 01252-01737; e) Lodi Main account 1072-03334;

2) The reconstructed Lodi Main account 1072-03354 statements for January 15, 1983 through August, 1985;

3) The forged Noe Valley statement production supplied in August, 1990;

4) The reconstructed bank statements for accounts with checking activity reflected on the 1990 forged Noe Valley statement production:

a) Noe Valley account 2552-09736; b) Noe Valley account 2553-09736; c) Downey-Paramount account 05646-03919;

5) Court documents filed in L.A.S.C. Case BC033836

a) The bank's vexatious litigant motion;

b) The petitioner's opposition to the vexatious litigant motion;

c) The bank's demurrer imposing fraudulent account stated defenses to both forged productions;

d) The petitioner's opposition to the demurrer;

e) Petitioner's requests for inspection of documents;

f) The bank's objections to requests for inspection citing the stay provision of the California Vexatious Litigant statute as the grounds for refusing to comply;

g) Petitioner's Motion to Compel production of documents in the requests for inspection;

h) The bank's opposition to the Motion to Compel;

i) The bank's respondent's brief in Appeal B065122 asserting fraudulent account stated defenses to both forged statement productions;

j) The petitioner's declaration on facts discovered while employed by Bank of America in 1994 which enabled the petitioner to explain how bank employees had created the two forged statement productions;

k) Petitioner's declarations in support of each checking account(There are 7 declarations in addition to the Lodi Main account 1072-03354 declaration).

A cause of action is defined by the wrongful acts supporting the cause. The conspiracy to produce forged evidence cause alleged 9 overt acts in furtherance of the conspiracy, all of which were acts motivated by the singular intent of deceiving the courts into believing both forged statement productions were authentic[18]:

1) The conversion of the debtor's banking records in August, 1987 by agents of B & A Self-Storage;
2) The 1988 Lodi Main forged statement production;
3) The 1990 Noe Valley forged statement production;
4) The bank's motion for a protective order in the Bankruptcy Court action;
5) Bank counsel, Ms. Young's January 8, 1992 letter promising inspection of signature cards at hearing.
6) The bank's Vexatious Litigant Motion in L.A.S.C. BC033836;
7) The bank's objections to petitioner's inspection requests imposing the stay provision of the California Vexatious Litigant Statute as the grounds;
8) The bank's demurrer imposing fraudulent account stated defenses to both forged productions;
9) The bank's respondent's brief in Appeal B065122 imposing fraudulent account stated defenses.

Facts 2, 4 and 5 were the 3 predicate RICO acts alleged in the civil RICO cause. In the trial court papers, and opening brief, the petitioner also identified 12 additional overt acts in furtherance of the conspiracy that were com-

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[18] The petitioner discovered prior to filing the current action that the California Legislature had enacted into law an exclusion to the immunity provision in California Civil Code §47(2) in actions involving forged evidence in 1991, which is why facts 4-9 were not alleged in the conspiracy cause prior to this action.

mitted during the bank relationship. The fact that these nine acts resulted in the petitioner not recovering the funds in Causes I-IV while Case BC033836 was pending is immaterial when the funds are not an element of damages in the conspiracy to produce forged statements.

In Case 95-2706GHK, the court ruled that the Lodi Main forged production was the only act of mail fraud, and determined on the merits that the bank had not engaged in a scheme to deprive the estate of funds in Lodi Main account 1072-03354(187a-188a). The court's decision is not on the merits of the distinguishable wrong whether the bank engaged in a conspiracy to produce forged bank statements for two checking accounts.

The Ninth Circuit has its own rule of res judicata as articulated in *Costantini v. Trans World Airlines* 681 F.2d 1199 (9th Cir. 1982). Under this case, two causes of action are deemed the same if they infringe on the same rights. The civil RICO action infringed on the estate's right to recover funds in Lodi Main account 1072-03354. The bank's conspiracy to produce forged statements infringed on the estate's right to recover funds in all four accounts identified in Causes I-IV, and the petitioner's due process rights to a fair hearing in L.A.S.C. Case BC033836(41a-44a).

In addition, the bank's production of the forged Lodi Main statements infringed on the estate's right to authentic statement copies for the estate's two Stockton Main branch accounts and two Lodi Main branch accounts. The bank's production of the forged Noe Valley statements infringed on the estate's right to authentic statement copies for Noe Valley account 2553-09736, and Downey-Paramount account 05646-03919(See RE, 194a-195a).

The civil RICO cause in Case 95-2706GHKa nd the conspiracy to produce forged bank statements do not involve the infringement of the same rights. The appeals panel failed to follow the rules of res judicata followed by other panels in the Ninth Circuit Court of Appeals, as well as the federal rules of res judicata established by this Court.

The Fifth Circuit decided this question correctly. The

petitioner could re-file the cause alleging all 21 overt acts, and the next court would not know which ruling to follow. The petitioner is hopeful the Supreme Court would resolve this conflict by returning the matter to the trial court for a decision on the merits in the interests of justice.

V. DOES THE CALIFORNIA VEXATIOUS LITIGANT STATUTE(C.C.P. §391 et al) VIOLATE THE 14TH AMENDMENT GUARANTEE OF EQUAL PROTECTION OF THE LAW?

A. The Stay Provision(C.C.P. §391.6)

C.C.P. §391.6 essentially states that when a party brings a motion under this statute, the litigation is stayed until the motion is denied or the security is posted(202a).

The Supreme Court has established in prior decisions how a party to a lawsuit has a constitutional right to conduct discovery. When L.A.S.C. Case BC033836 was filed, the documents proving the two statement productions to be false evidence was solely in the possession of the bank. These documents were check copies which would have proven that the 215 duplicate checks on the Lodi Main production, and checks 86-89 on the Noe Valley production, were written and paid on other checking accounts.

The fact that the bank filed the motion purely to invoke the stay provision to obstruct the petitioner and the estate creditor's rights to discovery is made clear on each of the bank's responses to a request(96a-104a):

"Bank of America will await the ruling on its Motion for a Determination that Plaintiff is a Vexatious Litigant and Required to Post Security."

The petitioner filed a motion to compel compliance with the request, and filed Appeal B064366 from the denial of the motion so a California Appeals Court could decide whether the stay provision should apply to discovery ef-

forts. As explained in the following section, the California Court of Appeals did not review and decide this question in its decision in October, 1994(134a-153a). Accordingly, the petitioner now brings this question before the Supreme Court, can a state enact a legislative bar violating a plaintiff's due process right to conduct discovery?

B. California Code of Civil Procedure §391(b)(3)

This subsection of C.C.P. §391 allows a party without an attorney to be declared a vexatious litigant for engageing in frivolous conduct. A bankruptcy estate cannot be declared a vexatious litigant, and bank counsel certainly understood this prior to filing the motion. If the petitioner had engaged in frivolous conduct, the bank's remedy was to file a motion for sanctions, not file a vexatious litigant motion to deprive the estate of funds on deposit.

The bank's vexatious litigant motion was designed solely to deceive the trial court. The first 4 pages of the motion compared general allegations in the complaints filed in L.A.S.C Case C736722(involving pre-petition actions), with L.A.S.C. Case BC033836(involving post-petition actions), and then deliberately misrepresented that the petitioner had filed five actions on the same issues, when, in fact, Case BC033836 was the second suit filed on the conspiracy to produce forged bank statements(107a-110a).

The bank's motion then repeated the first fabrications of misconduct that were attributed to the petitioner by bank counsel in the Bankruptcy Court action where counsel falsely accused the petitioner in the motion for a protective order and at hearing(80a-83a), of:

1) Propounding frivolous discovery
2) Wanting to take depositions at night
3) Leaving harassing messages on counsel's voice machine
4) Alleging bank employees of conspiring to kidnap the petitioner's collie

The petitioner did not engage in any of this conduct. Bank counsel repeated these wrongful charges and added new fabrications in the bank's vexatious litigant motion (113a) to support the claim that the petitioner engaged in frivolous conduct. Bank counsel's fabrications had no citations to the court record to support these false claims.

The petitioner had not asked for documents over and over again, he had propounded requests for check copies twice. The petitioner had not claimed he invented the expression, "Give Me A Break", he merely used it at the age of five(54a-55a). The petitioner had not claimed to have changed California's penal system in any declaration, and bank counsel had no right to dispute any facts outside of their knowledge involving the bank's agreement in 1960 with the petitioner over the poem, "Tender Bell"(68a-69a).

Finally, bank counsel's claim in the motion that the Bankruptcy Court had entered the protective order on a finding of frivolous conduct by the petitioner was a deliberate misrepresentation of the court's decision(113a), the transcripts of the hearings clearly show the Court granted the motion in reliance on bank counsel's fraudulent claim that a trustee had been appointed and the petitioner had filed the suit without the trustee's approval(33-85a).

The trial court relied on bank counsel's misrepresentations in the bank's vexatious litigant motion even when the petitioner had filed the same reporter's transcripts with the court that are in the appendix to this writ. When attorneys can fabricate misconduct by a plaintiff to mislead a trial court to base a finding under subsection (b)(3), as the petitioner has shown here, the question is presented how many more in pro per litigants will be similarly deprived of a fair day in a California court by a counsel for a defendant pursuing a miscarriage of justice under this subsection of the California Vexatious Litigant statute?

The filing of a lawsuit by an in pro se litigant is not a crime, it's a constitutionally protected right. When a bad faith defendant can fabricate misconduct and attribute it

to the party, the Vexatious Litigant statute allows California courts to classify such plaintiff's as a suspect class, and deprive them of their constitutional right to be heard. This section should be held unconstitutional when state law provides that in pro se litigants can be sanctioned for misconduct the same way as any practicing attorney.

C. California Code of Civil Procedure §391.1

This section of the statute requires a party bringing a vexatious litigant motion to show that a plaintiff is a vexatious litigant, **and**:

> "...supported by a showing...that there is not a reasonable probability that he will prevail in the litigation against the defendant"(201a).

The bank's motion in Case BC033836 had no showing anywhere that the petitioner lacked a reasonable probability of prevailing on the causes raised in that action(105a-115a). The bank's half page discussion in the motion filed in Case C736722 was not responsive to the causes of action raised in the complaint in that action either(118a).

When a plaintiff files an action and pays a filing fee, whether they are represented by legal counsel or not, they have every right to expect that the court will tell them whether they have stated a cause of action. The question presented to the Supreme Court here is does a court's failure to fairly review and decide whether a party has stated a cause of action when a motion is brought under the California Vexatious Litigant statute violate the 14th Amendment guarantee of equal protection of the law[19].

In Case BC033836, the complaint stated two timely deceit causes of action under Cal. Civil Code §1710(2) filed

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19 Prior to filing Case BC033836, the petitioner contacted several law firms in the Los Angeles area, but could not find any attorney interested in taking up the case.

within three years of the bank's production of both forged statement productions as required by Cal. Code of Civil Procedure §338(d), and a timely conspiracy to produce forged evidence cause filed within one year of the Noe Valley forged production. The first cause to recover funds in the Arden-Ethan account was misplead, but correctable by amendment under Cal. Civil Code §1712 and Cal. Code of Civil Procedure §348.

In Case C736722, alleging pre-petition causes of action, the petitioner stated a timely cause alleging the bank's breach of the 154-83308 loan agreement, filed within 4 years, pursuant to Cal. Code of Civil Proc. §337, of the bank's advisement on September 10, 1985 that the bank would not honor the self-insurance obligation in the contract. The complaint also stated a timely cause based on fraud arising from the bank's loan fraud scheme committed in 1985 and into 1986, which was timely filed allowing for equitable tolling while the same cause based on negligence was pending in the Sacramento proceeding. The complaint also stated a timely action in conversion filed within 3 years of the bank's advisement in October, 1986, that the bank had failed to hold a reasonable comercial sale of the sailboat after the petitioner refused to take possession of the sailboat back in its un-repaired state in September, 1985[20].

The trial court's minute order in Case BC033836 found the petitioner a vexatious litigant in reliance on bank counsel's misrepresentations of the record(infra, pgs. 10-11), and failed to explain on what basis it found the petitioner lacked a reasonable probability of prevailing in the action (120a). Essentially, the court required the petitioner to post $25,000.00 in security prior to a fair hearing

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[20] In Case C736722, all of the causes of action were estate causes, and the first three causes in Case BC033836 were estate causes, the estate was the only real party in interest in these causes. The petitioner was a real party in interest only in the conspiracy cause in Case BC033836.

being held as to whether the petitioner had stated any causes of action on behalf of the estate.

The bank's vexatious litigant motions in L.A.S.C. Cases BC033836 and C736722 show how easily a Fortune 100 company can completely sidestep the obligation to show that an in pro se party has failed to state a cause of action by devoting its motion purely to attacking the integrity of the plaintiff in the action and distracting the trial court from conducting a fair and impartial review of the case.

Did the petitioner have a reasonable probability of prevailing in Case BC033836? The original signature card for Lodi Main account 1072-03354, if unaltered, would have proven the Lodi Main production forged evidence since there was activity before the account was opened. The petitioner had a reasonable probability of prevailing, had the stay provision of the statute not infringed on the petitioner's due process right to conduct discovery.

The petitioner filed Appeal B065122 from the order dismissing Case BC033836(122a-123a). Division Three of the Second Appellate District did not review the two trial court determinations in Case BC033836in its opinion in the consolidated appeals (134a-153a). The petitioner discovered why in April, 1996, while preparing the petition to recall the remittitur after reconstructing his entire banking relationship[21]. The Appeals Court did not want to name a former California Appellate Justice, Mr. Winslow Christian, as a respondent on an opinion reviewing a trial court decision involving the bank's production of forged bank statements[22].

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21 The petitioner's ability to reconstruct his banking relationship is largely due to the fact that the petitioner is an accountant, with a B. S. in Accounting from Golden Gate University in San Francisco.

22 The Appeals Court's failure to review and decide the two appeals in Case BC033836(Appeals B064366 and B065122) is a violation of Article 6, Section 14 of the California Constitution requiring all reviews of trial court decisions to be in writing.

This is why the Appeals Court opinion identifies the two related Appeal cases on its face, but does not discuss the appealable issues in those cases, and does not identify Mr. Christian on the opinion as a named respondent.

In *Little v. Streater*, 452 U. S. 1 (1981), the Supreme Court ruled that a state's imposition of a financial burden on a party before affording him a fair hearing constituted a denial of equal protection of the law. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), the Supreme Court ruled that the trial court's failure to follow a statutorily mandated procedure likewise deprived a plaintiff of equal protection of the law.

In *Cleveland Board of Education v. Loudermill*, 470 U. S. 532 (1985), the Supreme Court held that a plaintiff had a due process right to present evidence prior to dismissal, and this same rule would apply to the petitioner's right to discovery of documents in the bank's possession that were necessary to prove the petitioner had more than a reasonable probability of prevailing on the causes raised in Case BC033836. In *Cleveland(supra)*, the Court clarified the rule:

> "the Due Process Clause provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures".

The rationale applied in these cases cited above would appear to be applicable to the petitioner's claim that the Vexatious Litigant statute also deprives in pro se litigants of equal protection of the law, when, as shown in Case BC033836, the bank brought a vexatious litigant motion to deprive the plaintiff of the opportunity to be heard as to whether he had stated a cause of action, and to deprive the bankruptcy estate of rightful possession of property(funds on deposit) through the normal course of an adjudicative process in L.A.S.C. Case BC033836.

The petitioner has shown how the "reasonable probability" standard in the Vexatious Litigant statute allows California courts to avoid, entirely, the legal duty to render objective determinations on the issues raised in a complaint in an action when it is filed by a party lacking an attorney. The petitioner believes that the language in this subsection is unconstitutionally vague, and clearly can be mis-interpreted by trial courts in a manner that can cost an in pro se litigant their fair day in court.

CONCLUSION

The appeals court record below documents that Bank of America not only embezzled monies from a depositor, but also supplied forged statement copies for two checking accounts, as documented in the table of contents to the Record Excerpts(193a-199a). The bank has known both productions to have been proven false evidence since the petitioner first filed the petition to recall the remittitur in Appeals B064366 and B065122, 8 years ago in 1996, supported by the same record. The petitioner believed that when Nations Bank merged with Bank of America, the bank's new management would want to resolve these issues in a responsible manner. The fact that the petitioner has had to file a writ of certiorari with the Supreme Court proves the bank has only one objective, to avoid a trial on the merits.

The petitioner has presented five questions for review, and is hopeful that the Supreme Court would consider it important to review all of the questions, most importantly the constitutionality of the California Vexatious Litigant Statute.

The petitioner has shown that the Ninth Circuit failed to follow this Court's rulings in *Johnson v. Collier(supra)* and in *Meyer v. Fleming(supra)*, which have held a debtor has standing in the absence of action by a trustee. The petitioner has also shown how the Ninth Circuit panel erred in finding the petitioner's cause alleging a conspiracy

to produce forged bank statements as barred by the civil RICO dismissal in Case 95-2706GHK, the Appeals Court failing to follow the Ninth Circuit's own rules of res judicata as formulated in *Costantini v. Trans World Airlines* (supra). The Fifth Circuit Court of Appeals decided this question correctly.

To leave the Ninth Circuit decision uncorrected would, unfortunately, document in the public record that a plaintiff cannot obtain a fair determination in a federal Appeals Court located in the same city where the two forged bank statement productions were created. These matters are both appropriately resolvable by the Supreme Court in a summary reversal of the Ninth Circuit decision.

The petitioner believes that his challenge to the California Vexatious Litigant statute is certainly the most worthy case that could be presented to the Supreme Court to review the constitutionality of such statutes. As previously stated, a bankruptcy estate cannot be declared a vexatious litigant. The record on appeal proves why the bank relied on the statute to deprive the petitioner of his constitutional right to discovery and a fair hearing. The petitioner has provided the Supreme Court in this writ and the attached appendix sufficient factual support for the Court's consideration of the worthiness of this important question.

For the reasons stated within this writ, the petitioner's writ of certiorari should be granted.

Respectfully Submitted,

Wayne T. Ziegler, petitioner
in pro se

November 18, 2004

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 03-15315

D.C. No. CV-00-00188CW

WAYNE T. ZIEGLER
Plaintiff-Appellant

v.

BANK OF AMERICA, NT & SA; et al
Defendants – Appellees

And,

GEORGE W. COOMBES, Jr.; et al
Defendants

Appeal from the United States District Court
For the Northern District of California
Claudia Wilken, District Judge, Presiding

MEMORANDUM*

Submitted May 12, 2004**

Before: O'SCANNLAIN, SILER***, and HAWKINS, Circuit Judges.

Wayne T. Ziegler appeals from the district court's Fed R. Civ. P. 12(b)(6) dismissal of his claims against Bank of America("the Bank").

Ziegler admits that he purposely failed to disclose the potential causes of action arising from disputes regarding the bank's administration of his accounts on the schedule of assets he filed in connection with his Chapter 7 bankruptcy petition. This breach of his affirmative duty to schedule assets and liabilities estops him from litigating causes of action concealed from his creditors and the bankruptcy trustee. See First Nat'l Bank of Jacksboro v. Lasater, 196 U.S. 115, 119 (1905). We therefore conclude that the district court did not err in dismissing the four claims relating to Ziegler's accounts.

Ziegler's claim alleging a conspiracy between the Bank and the operators of a self-storage facility is identical to a Racketeer Influenced and Corrupt Organizations

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** The panel unanimously find this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2)(C).

*** The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

("RICO") claim advanced by Ziegler and dismissed with prejudice in an earlier action against the Bank in the Central District of California. Such dismissal constitutes a final judgment on the merits for purposes of res judicata. See Stewart v. US Bankcorp, 297 F.3d 953, 957 (9th Cir. 2002). We conclude that the district court dismissed the conspiracy claim as barred by res judicata. See id. at 956.

Ziegler's claim under RICO arises from the "same transaction or series of transactions" that gave rise to claims dismissed with prejudice in actions in both the Central District of California and the Southern District of Texas. See W. Sys. Inc. v. Ulloa, 958 F.2d 864, 871 (9th Cir. 1992). We therefore hold that res judicata also bars the RICO claim.

Ziegler's constitutional challenge to California's "vexatious litigant" statute, see Cal. Civ. Proc. Code §391, was never pleaded as an independent cause of action in the district court below. Because the claim is raised for the first time on appeal, we decline to address it. See Bolker v. Comm'r of Internal Revenue, 760 F.2d 1039, 1042 (9th Cir. 1985).

Ziegler's request for publication is DENIED.

The judgment of the district court is AFFIRMED.

Date Filed: May 28, 2004

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CIVIL ACTION CV-00-0188CW

WAYNE T. ZIEGLER,
Plaintiff,

v.

BANK OF AMERICA,
Defendant

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS

Defendant Bank of America moves under Federal Rule of Civil Procedure 12(b)(6) to dismiss all claims in Plaintiff's First Amended Complaint (FAC) for failure to state a claim upon which relief can be granted. Plaintiff Wayne T. Ziegler filed an opposition to the motion[1]. On

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[1] In support of his opposition, Plaintiff submits four declarations. Because this is a motion to dismiss, the Court will not consider these declarations in its ruling. See Durning v. First Boston., 815 F.2d 1265, 1267 (9th Cir. 1987) (on a motion to dismiss a Court may only consider allegations in the pleadings or documents attached thereto). Plaintiff also requests that the Court take judicial notice of documents filed in his previous court cases. The Court grants this request. See Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc., 969 F.2d 1384, 1389 (2nd Cir. 1992) (court may take judicial notice of a document filed in another court, not for the truth of the matter asserted n the other litigation, but to establish the fact of such litigation and filing). The Court has previously taken judicial notice of other

January 13, 2003, Plaintiff submitted a supplemental opposition. In the interests of justice, the Court considers Plaintiff's supplemental brief. The motion was scheduled to be heard on January 17, 2003. Defendant's counsel appeared; Plaintiff did not. Accordingly, the Court did not hear argument but decided the matter on the papers. Having considered all the papers filed by the parties, the Court grants the motion.

BACKGROUND

On January 18, 2000, Plaintiff filed his complaint in this Court alleging the following eight causes of action: (1) recovery of $8,153.20 Plaintiff had on deposit at Defendant's Arden-Ethan branch, based upon events that occurred in 1982, Comp. ¶ 107; (2) recovery of $24,450.71 Plaintiff had on deposit at Defendant's Lodi Main branch, based upon events that occurred in 1982, 1983, and 1984, Comp. ¶ 144; (3) recovery of $6,006.71 Plaintiff had on deposit at Defendant's Noe Valley branch, based on events that occurred in 1985, Comp. ¶ 179; (4) recovery of $915.75 Plaintiff had on deposit at Defendant's Downey-Paramount branch, based on events that occurred in 1985, Comp ¶¶ 194, 204; (5) conspiracy between Defendant and B & A Self-Storage to steal bank statements for several of Plaintiff's checking accounts for the purpose of allowing Defendant to supply forged statements, based on events that occurred in 1987, 1988 and 1989, and events that occurred during the litigation of lawsuits in 1990 through 1992, Comp. ¶¶ 205, 214; (6) conspiracy between Defendant, B & A Self-Storage, Defendant's legal department, and Defendant's outside counsel to deprive Plaintiff of the funds at issue in causes of actions one through four, Comp. ¶ 299; (7) breach of the

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court documents filed in this case. See March 9, 2001 Order Denying Defendant's Motion to Dismiss and Denying Plaintiff's Request for Leave to Amend at 16.

covenant to act in good faith arising from Defendant's actions in two prior lawsuits, Comp. ¶ 279; (8) breach of the covenant to act in good faith arising from Defendant's actions in three prior lawsuits, Comp. ¶ 316.

On March 24, 2000, Defendant filed a first motion to dismiss based on res judicata grounds. On March 9, 2001, in its Order Denying Defendant's Motion to Dismiss and Denying Plaintiff's Request for Leave to Amend (March, 2001 Order), the Court held that res judicata did not bar Plaintiff's claims.

On April 4, 2001, Defendant filed a second motion under Federal Rule of Civil Procedure 12(b)(6) to dismiss all claims for failure to comply with applicable statute of limitations, to dismiss the fifth, sixth, seventh, and eighth claims as barred by California's litigation privilege, and to dismiss the seventh and eighth claims because there is no tort for breach of covenant to act in good faith. In its May 28, 2002 Order Granting, in Part, Defendant's Motion to Dismiss and Granting, In Part, Plaintiff's Requests for Leave to Amend Complaint (May, 2002 Order), the Court held that the first through fifth claims were not barred by any statute of limitations, the sixth claim was barred by the statute of limitations, and the seventh and eight claims were barred by California's litigation privilege. The Court granted Plaintiff leave to amend to allege a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962 et seq.

On July 11, 2002, Plaintiff filed his FAC[2] alleging six claims consisting of the five claims described above and a new RICO claim.

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[2] In the FAC, Plaintiff has added five individuals and two law firms as Defendants in his RICO claim. It does not appear that Plaintiff has served a summons and complaint on these new Defendants.

LEGAL STANDARD

A motion to dismiss for failure to state a claim will be denied unless it appears that the plaintiff can prove no set of acts which would entitled it to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Fidelity Fin. Corp. v. Federal Home Loan Bank of San Francisco, 792 F.2d 1432, 1435 (9th Cir. 1986). All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). Dismissal of a complaint can be based on either the lack of a cognizeable legal theory or the lack of sufficient facts alleged under a cognizable legal theory. Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988).

DISCUSSION

I. Claims One Through Four

Defendant argues that claims one through must be dismissed because they are property of Plaintiff's Chapter 7 bankruptcy estate, and thus Plaintiff lacks standing to pursue them. Plaintiff contends that he has standing to pursue claims one through four because when he reopened his Chapter 7 bankruptcy case, the Chapter 7 trustee abandoned them and their ownership reverted to him.

When a bankruptcy petition is filed, an estate is created. Cusano v. Klein, 264 F.3d 936, 945 (9th Cir. 2001). Property of the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of

the commencement of the case." Id. (citing 11 U.S.C. § 541(a)). The estate includes any causes of action that arose prior to the filing of the bankruptcy petition. Id.

In the bankruptcy context, "abandonment" is a term of art to designate the "formal relinquishment of the property at issue from the bankruptcy estate. Upon abandonment, the debtor's interest in the property is restored nunc pro tunc as of the filing of the bankruptcy petition Catalano v. Commissioner of Internal Revenue, 279 F.3d 682, 685 (9th Cir. 2002) Section 554 of the Bankruptcy Code governs abandonment of property:

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
(c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of the case is abandoned to the debtor and administered for purposes of Section 350 of this title.
(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

11 U.S.C. § 554.

The Bankruptcy Code places an obligation on the debtor to schedule all assets and liabilities. Cusano, 264 F.3d at 945 (citing 11 U.S.C. § 521(1)). If a debtor fails to schedule an asset, including a cause of action that accrued prior to the filing of the bankruptcy petition, the

asset continues to be property of the bankruptcy estate after the case is closed. Id. at 946. In that case, the debtor lacks standing to pursue the cause of action after the bankruptcy case closes. Id. at 945, 947[3].

On April 16, 1986, Plaintiff filed a Chapter 7 bankruptcy petition. FAC, ¶ 47. Plaintiff did not list claims one through four on his schedule of assets. Id. On September 30, 1986, the bankruptcy court entered an order of discharge. Id. On May 22, 1990, Plaintiff filed a petition to re-open his bankruptcy case. Pl.'s Req. for Judicial Notice (Pl's Req.), Ex. 1. On August 13, 1990, the bankruptcy court issued an order granting the petition to re-open the case. Pl.'s Req., Ex. 2. On September 7, 1990, Plaintiff filed an Amended Schedule of Assets in his bankruptcy case. Pl.'s Req., Ex. 3. The Amended Schedule of Assets included an asset titled, "Disputed Asset Claims" under which was listed two items: "Cash due from Bank of America -- $49,345" and "Interest on Disputed Funds -- $23,186." Id. An attached Exhibit A, titled "Analysis of Deposit Fraud Damages," is a spreadsheet consisting of nine line-items with columns titled, "Date Accruing," "Amount," "Days thru 01-Oct-90", "Annual Interest," "Total Interest @ 7%," and "Total Due". Total amounts listed at the bottom of the page indicate General Damages of $72,531. Punitive Damages of

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[3] In his supplemental opposition, Plaintiff argues that Cusano only applies to Chapter 11 bankruptcy petitions. However, Cusano relied upon 11 U.S.C. § 521 which applies to all bankruptcy petitions. See 11 U.S.C. § 103 (chapter 5 of title 121 applies to cases filed under chapter 7, 11, 12 or 13 of title 11). Likewise, § 554 applies to bankruptcy cases filed under all chapters of title 11. Also, in his supplemental opposition, Plaintiff cites to line 10 of a 1991 version of Bankruptcy Form No. 7, in support of an argument that he was not required to list in his schedule of assets any causes of action that were not commenced before the filing of the bankruptcy petition. Any legal significance this form might have is supplanted by Ninth Circuit authority interpreting the Bankruptcy Code.

$217,593, and Total Damages of $290,124. The Amended Schedule of Assets also includes an asset titled "'Core' Asset Claims in Litigation" under which is listed on item: "Actual Cash Value of Sailboat -- $13,750." The Amended Schedule of Assets was served on the United States Trustee. Id.

Sometime in May or June, 1991, Plaintiff filed an adversary proceeding in his bankruptcy case against Defendant and Tom C. Elkins. Pl.'s First Req. for Judicial Notice (Pl.'s First Req.), Ex. 35. In a letter dated June 10, 1991, Lorraine L. Loder, the Chapter 7 trustee in Plaintiff's 1986 bankruptcy case, wrote to the bankruptcy court:

The debtor in the above referenced matter [Plaintiff's 1986 bankruptcy case] has advised me that the court had requested information about the position of the trustee in connection with the debtor's action against the Bank of America. Although I acted as the Chapter 7 trustee in the above referenced matter, I was discharged as trustee in this matter when a no asset report was filed on or about July 25, 1986. I have spoken with the United States Trustee's office regarding this matter and was advised that I have not been reappointed in connection with this case, and that no chapter 7 trustee has been or will be appointed in this case unless and until the monies are collected.

Pl.'s First Req., Ex. 34

On January 30, 1992, the bankruptcy court entered orders dismissing Plaintiff's adversary proceeding and vacating its prior order re-opening Plaintiff's bankruptcy case (Order Vacating Re-opening). Pl.'s First Req., Ex. 36. In the Order Vacating Re-opening, the court indicated that if Plaintiff wished to pursue litigation

against the Defendant, he could continue to do so in State Court. Id. [4]

Plaintiff does not dispute that claims one through four arose prior to the filing of his bankruptcy case in 1986 and that when his case was closed, they remained property of his bankruptcy estate because he did not list them in his schedule of assets. However, Plaintiff argues that he has standing to litigate these claims based on the events that occurred after his bankruptcy case was re-opened in 1990 because he filed an "amended asset schedule for funds on deposit. The Office of the U.S. Trustee elected not to appoint a trustee. Whereupon, the plaintiff commenced suit on the conspiracy to produce forged evidence in the Bankruptcy Court...the Bankruptcy Court clearly conveyed that the plaintiff could continue with the litigation." Pl.'s Opp. at 8.

In his argument, Plaintiff overlooks the fact that, on January 30, 1992, the bankruptcy court issued its Order Vacating Re-opening. Without citing authority, Defendant argues that the Order Vacating Re-opening nullified the proceedings that occurred between the 1990 re-opening of the bankruptcy case and the 1992 Order Vacating Re-opening. According to Defendant, this means that the 1990 amended schedule of assets that Plaintiff relies upon had no legal effect. The Court was unable to find authority substantiating that the vacating of an order re-opening a bankruptcy case nullifies all proceedings that occur between the time the case is re-opened and the time the re-opening is vacated. However,

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[4] At that time, Plaintiff had a pending action in State court against Defendant alleging causes of action relating to this sailboat. See Pl.'s opp. at 3. The adversary proceeding Plaintiff filed in his bankruptcy case addressed "the conspiracy to produce forged evidence," which Plaintiff indicates is the same as the fifth claim in the FAC. See id. at 4. It appears that the bankruptcy judge mistakenly believed the State case addressed the same issues in the adversary proceeding.

11 U.S.C. § 349, which governs the effect of a dismissal of a bankruptcy case is instructive. Section 349(b) provides, in relevant part:

> Unless the court, for cause orders otherwise, a dismissal of a case other than under section 742 of this title--
>
> (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

11 U.S.C. §349 (b).

"Dismissal of a case operates to reinstate the status of the interests of the debtor and his creditors to their statute quo ante. "The basic purpose of the subsection is to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case.'" In re Lawson, 156 B.R. 43, 45 (B.A.P. 9th Cir. 1993) (citing legislative history of § 349 at H.R.Rep. No. 595, 95th Cong., 1st Sess., 337-38 (1977), 1978 U.S.C.C.A.N. at 5787, 6294).

In dismissing a bankruptcy case, the court decides the case should not have been filed; in vacating the re-opening of a case, the bankruptcy court decides that the case should not have been re-opened. Whether a bankruptcy court issues an order of dismissal or an order vacating a re-opening appears to depend solely on whether the case is pending or whether the case has been closed and then re-opened. Therefore, the Court concludes that vacating an order re-opening a bankruptcy case has the same effect on the bankruptcy proceedings as a dismissal of the case under §349.

Applying this reasoning to the facts of this case leads to the conclusion that the bankruptcy court's Order Vacating Re-opening restored any property rights which may have been affected by proceedings which took place after the case was re-opened to the position they were in

before the case was re-opened. As discussed above, prior to the re-opening of the bankruptcy case, claims one through four were property of Plaintiff's bankruptcy estate because they accrued before he filed the 1986 bankruptcy petition and he did not list them in his schedule of assets. Even if the events that occurred after the bankruptcy case was re-opened could be construed to constitute an abandonment of claims one through four by the trustee which would have vested ownership in Plaintiff, the vacating of the re-opening re-vested ownership of the claims in the bankruptcy estate. Under Cusano, therefore, Plaintiff lacks standing to pursue these claims here.

Citing Cloud v. Northrup Grumman Corp., 67 Cal. App. 4th 998 (1998), Plaintiff requests, in the event that the Court rules that he lacks standing, that he be allowed leave to amend to substitute in the trustee as the real party in interest. Plaintiff argues that he should be allowed to re-open the bankruptcy case and have a trustee appointed to substitute in as a real party. Defendant argues that amendment would be futile because the trustee refused to participate in this action when requested by Plaintiff in 1991, and she will undoubtedly refuse to do so at this late date.

In Northrup, the plaintiff field an unlawful termination and sexual harassment action against her former employer during the pendency of her bankruptcy case. Id. at 998-99. She failed to list the litigation in her schedule of assets in the bankruptcy case. Id. at 998. The bankruptcy case as closed while the lawsuit continued. Id. at 999. After the bankruptcy case closed, the defendant in the civil action moved for judgment on the pleadings on the ground that the plaintiff lacked standing to pursue the litigation because the lawsuit remained an asset of the bankruptcy estate. Id. The court agreed that the lawsuit remained property of the bankruptcy estate, but ruled that the plaintiff should have been given leave to amend to substitute in the

bankruptcy trustee as the real party in interest or to obtain the trustee's abandonment of the claim. Id. at 1000.

The facts here are similar to Northrup. Although Defendant is correct that it is unlikely that a Chapter 7 trustee, if appointed in Plaintiff's bankruptcy case, would agree to participate in the claims at issue here, Plaintiff may be able to obtain an order abandoning these claims. In order to obtain an order of abandonment, Plaintiff must once again move the bankruptcy court to re-open his case and if he succeeds in having his case re-opened, he must follow the procedure set out in Catalano, 279 F.3d at 685-86 (abandonment requires formal notice and a hearing) and Sierra Switchboard Co. v. Westinghouse Elec. Corp., 789 F.2d 705, 709-710 (9th Cir. 1986) (party proposing abandonment must give notice to all creditors).

Therefore, the Court will dismiss claims one through four, but it will do so without prejudice to refiling should Plaintiff be able to obtain an order of abandonment from the bankruptcy court. The Court notes that in Northrup, the court ruled that the plaintiff should have been granted leave to amend because the statute of limitations on the plaintiff's claims was an issue and substituting in the real party in interest would allow the claims to relate back to the date the original complaint was filed. Northrup, 57 Cal.App.4th at 1010-11. As discussed in the Court's May, 2002 Order, the claims at issue here are not subject to a statute of limitations. Therefore, dismissal without prejudice will allow Plaintiff to litigate these claims by filing a new complaint should he succeed in obtaining an order of abandonment from the bankruptcy court.

II. Claim Five

Defendant moves for dismissal of Plaintiff's fifth claim on res judicata grounds based upon a judgment obtained in a 1995 lawsuit Plaintiff filed against Defendant in the

Central District of California (Central District Action). See March, 2001 Order at 12-13 (providing facts).[5] Defendant contents that Plaintiff's fifth claim is identical to a claim Plaintiff alleged in the Central District Action. Because the Central District court construed that claim to be a RICO claim and then dismissed it as barred by the applicable statute of limitations, Defendant contends that, under federal law, the dismissal is a judgment on the merits which precludes Plaintiff from litigating the same claim here.

Plaintiff argues that because this is a diversity action, California res judicata law applies and under California law, res judicata does not bar this claim.

In Plaintiff's original complaint, he plead only State claims and therefore, at that time the Court exercised diversity jurisdiction over this action under 28 U.S.C. §1332. However, in his FAC, Plaintiff has plead a federal RICO claim. Thus, at this time, the Court exercises original jurisdiction over this action under 28 U.S.C. § 1331. See 28 U.S.C. § 1331 ("The district court's shall have original jurisdiction of all civil actions arising under the Constitution, law, or treaties of the United States."). Therefore, federal res judicata law applies.[6] Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001), cited by Plaintiff, does not change this result. In Semtek, the court addressed the preclusive effect of a federal diversity court's judgment based on state statute of limitations grounds. Id. at 499-500.

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[5] In the March, 2001 Order, the Court ruled on the res judicata effect of a judgment obtained in a 1997 lawsuit Plaintiff filed against the Defendant in the Southern District in Texas. The Court has not ruled on the res judicata effect of the Central District judgment.

[6] Federal res judicata law would apply even if this case were still subject to diversity jurisdiction because California law provides that the res judicata effect of a prior federal judgment is determined by federal standards. See Levy v. Cohen, 19 Cal.3d 165, 172-72 (1977).

Res judicata, or claim preclusion, prohibits the re-litigation of any claims that were raised or could have been raised in a prior action. Western Radio Servs. Co., Inc. v. Glickman, 123 F.3d 1189, 1192 (9th Cir. 1997) (citing Federated Dep't Stores, Inc., v. Moitie, 452 U.S. 394, 398 (1981)). The purpose of the doctrine is to "relieve parties of the cost and vexation of multiple law suits, conserve judicial resources, and by preventing inconsistent decisions, encourage reliance on adjudication." Marin v. HEW, Health Care Financing Agency, 769 F.2d 590, 594 (9th Cir. 1985) (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980)). Res judicata operates only where there is "1) an identity of claims, 2) a final judgment on the merits, and 3) identity or privity between parties." Western Radio, 123 F.3d at 1192 (citing Blonder-Tongue Lab. v. University of Ill. Found., 402 U.S. 313, 323-324 (1971)).

Two claims or causes of action are the same, for the purposes of the first prong of the res judicata test, if they arise from the same transaction or series of transactions. Two events are part of the same transaction or series of transctions where the claims share a factual foundation such that they could have been tried together. Western Sys., Inc. v. Ulloa, 958 F.2d 864, 871 (9th Cir. 1992). "Different theories supporting the same claim for relief must be brought in the initial action." Id. Likewise, all evidence pertinent to a particular claim must be raised in the initial action because "when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597 (1948) (internal quotation marks omitted).

Plaintiff's fifth claim for relief "alleges a conspiracy between the Bank of America, and agents of a self-storage

business, B & A Self-Storage, to steal the plaintiff's estate's original bank statements for several checking accounts, for the purpose of allowing the bank's Legal Department to thereafter supply forged statement copies for the estate's Lodi Main checking account 1072-03354 and Noe Valley checking account 2553-09736." FAC, ¶ 213. In ¶ 225 of the FAC, Plaintiff alleges, "Between June 12, 1986 and June 1, 1987, agents of Bank of America approached B & A Self-Storage's on-site managers, John and Pam Key, ...and solicited the Key's involvement in obtaining the plaintiff's estate's original bank statements by unlawful means." In ¶ 227 of the FAC, Plaintiff alleges, "In June, 1987, the on-site managers engaged in a mail fraud scheme that involved mailing notices to the plaintiff that suggested that B & A Self-Storage had acquired a right to sell the plaintiff's property pursuant to a lien for failure to pay the past due rent for June, 1987, when, in fact, B & A Self-Storage had not satisfied statutory time requirements."

In Plaintiff's fourth claim for relief in the Central District Action, he sought "damages ... arising from a conspiracy to produce falsified bank statements through the U.S. mails. The conspiracy alleges that the bank...conspired with employees of a self-storage business to convert the plaintiff's original bank statements for several checking accounts for the purpose of allowing the bank to produce an altered version of those statements prepared with the intent of concealing the embezzlement of funds from the plaintiff's Arden-Ethan and Lodi Main Accounts from 1981 through 1984. Def.'s Req. For Judicial Notice (Def.'s Req), Ex. 36, Central District Action First Amended Complaint (CD FAC), ¶ 156. Paragraph 161 of the CD FAC alleges, "Between June 12, 1986 and June 1, 1987, agents of the Bank of America held discussions with B & A's on-site managers, John and Pam Key,...soliciting the Key's assistance in obtaining the plaintiff's bank statements by unlawful means." Paragraph 162 of the CD FAC alleges,

"In June, 1987, the Keys entered into a mail fraud scheme that involved preparing notices that would justify selling the plaintiff's property at an auction sale for past-due rent, thereby allowing the defendants to seize the plaintiff's banking records. The Keys mailed a preliminary lien and lien sale notice that were fabricated to make an auction sale appear legal."

On January 26, 1996, the Central District court issued an order dismissing Plaintiff's entire complaint with prejudice. Def.'s Req., Ex. 40, Central District Action Dismissal Order (CD Order). The court noted that the Plaintiff's fourth claim was an attempt to allege a civil claim under RICO §1962(a). The court noted that the alleged predicate acts underlying the RICO claim began in February, 1982 and ended by August, 1988. CD Order at 3. The court determined that because the statutory limitations period applicable to RICO claims is four years, Plaintiff had until August, 1992 to file his claim. Id. at 4. Because Plaintiff filed the Central District Action on April 24, 1995, the court ruled that the claim was time-barred. Id. The court dismissed the claim without leave to amend "due to the absence of any indication that plaintiff could replead [it] successfully." Id. at 5-6.

Both Plaintiff and Defendant were parties to the Central District Action. Plaintiff does not argue that there is not an identity of parties in the two actions. Therefore, the res judicata privity requirement is met.

Plaintiff argues res judicata does not bar his claim on the following grounds: (1) the final judgment in the 1995 lawsuit Plaintiff filed against Defendant in the district court in Texas (Texas Action) estops the defendant from asserting res judicata defense in this action; (2) the Central District dismissal on the statute of limitations

grounds is not a judgment on the merits; and (3) there is no identity of claims.[7]

A. Res Judicata Effect of Texas Judgment

In the Texas action, the district court dismissed Plaintiff's complaint on res judicata grounds. Def.'s Req., Ex. 46, May 20, 1998 Texas district court Order of Dismissal at 4-5. On appeal, the Fifth Circuit, noting that it could affirm the district court's dismissal order on any ground fairly supported by the record, affirmed the district court on statute of limitations grounds. Def.'s Req., Ex. 50, May 26, 1999 Fifth Circuit Order at 2-3. The Fifth Circuit did not address the res judicata argument.

Plaintiff's argument appears to be that because the issue of res judicata was fully briefed and decided by the Texas district court and because the Fifth Circuit chose to dismiss his action on another ground, the Fifth Circuit also held that res judicata did not apply to his claims. According to Plaintiff, because Defendant argued in the Texas Action that the res judicata effect of the Central District Judgment barred Plaintiff's Texas claims, the Fifth Circuit must have ruled against the Defendant on the issue of res judicata and, thus, Defendant cannot raise that same defense here.

Plaintiff's argument is unavailing. As explained in the Court's March, 2001 Order, "[w]here a trial court bases its judgment on alternative grounds, and the reviewing court affirms on only one of the two grounds, refusing to consider the other, the second ground is no longer conclusively established and can have no res judicata effect." March, 2001 Order at 17 (citing Martin v. Henley,

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[7] Plaintiff makes his identify of claims argument with the context of an argument that his claim is not barred by the doctrine of collateral estoppel. Because defendant does not proffer a collateral estoppel argument, the Court construes this as addressing the identity of claims requirement of res judicata.

452 F.2d 295, 299 (9th Cir. 1971)). Therefore, nothing in the Fifth Circuit's decision precludes Defendant from asserting that res judicata bars Plaintiff's fifth claim for relief.

B. Final Judgment on the Merits

Citing Gramm v. Lincoln, 257 F.2d 250 (9th Cir. 1959), Plaintiff argues that California rules of res judicata apply because this is a diversity action. Then, citing Addison v. State, 21 Cal. 3d 313 (1978) and Nichols v. Canoga Indus., 83 Cal. App. 3d 956 (1978), Plaintiff argues that, under California law, a dismissal of a federal claim on statute of limitations grounds is not construed as a bar to a state law cause of action involving the same facts.

As discussed above, the Court must apply federal principles of res judicata to determine the preclusive effect of the Central District court's judgment. Federal law provides that a dismissal with prejudice under Rule 12(b)(6) is a judgment on the merits to which res judicata applies. Stewart v. U. S. Bancorp, 297 F.3d 953, 957 (9th Cir. 2002). Furthermore, federal law, unlike California law, provides that a dismissal on the statute of limitations is a judgment on the merits for purposes of res judicata. Ellingson v. Burlington Northern, Inc., 653 F.2d 1327, 1330-31 n.3 (9th Cir. 1981). Therefore, the Central District judgment, which dismissed with prejudice the Plaintiff's RICO claim based on the statute of limitations, is a judgment on the merits for purposes of res judicata.

Plaintiff proffers an argument that the Central District dismissal was not a judgment on the merits because his fourth claim in the Central District was a State claim over which the court lacked jurisdiction. Even if this Court looked beyond the order issued by the court in the Central District Action, there would be no basis for finding a lack of jurisdiction. Plaintiff's claim in the Central District Action was labeled "Fourth Cause of

Action for Conspiracy to Commit Mail Fraud." The first paragraph in that claim referred to 18 U.S.C. §§ 1341 and 1964. Section 1341 is the federal mail fraud statute and § 1964 provides for civil remedies in federal RICO claims. Therefore, the Central District court properly construed Plaintiff's fourth cause of action as alleging a federal civil RICO claim and the court exercised jurisdiction over that claim pursuant to 28 U.S.C. § 1331 which provides that district courts shall have original jurisdiction of all civil actions arising under the laws of the United States. See 28 U.S.C. § 1331.

Plaintiff also argues that the Central District court lacked jurisdiction over the RICO claim because his complaint failed to adequately plead the elements of a RICO claim. Plaintiff's interpretation of federal subject matter jurisdiction is mistaken. Jurisdiction is not defeated by the possibility that the allegations in the complaint might fail to state a cause of action on which the plaintiff could actually recover; it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Bell v. Hood, 327 U.S. 678, 672 (1946). Whether the complaint states a cause of action on which relief could be granted is a question of law that must be decided after and not before the court has assumed jurisdiction over the controversy. Id. Because a RICO claim arises under the laws of the United States, the Central District Court exercised subject matter jurisdiction over it pursuant to § 1331.

C. Identity of Claims

As pointed out by Defendant, Plaintiff's RICO claim in the Central District Action is the same as his conspiracy claim here. The RICO claim there sought damages for the conspiracy between Defendant and B & A Self-Storage "to produce false bank statements through the U. S. mails," by converting Plaintiff's original bank

statements which he had stored at B & A Self-Storage and then sending him forged versions of those statements. In the fifth claim in Plaintiff's FAC, he asserts the same allegations. See FAC, ¶ 213.

Interpreting Plaintiff's opposition liberally, it appear that he argues that there is no identity between the fifth claim in his FAC and the fourth claim in the Central District Action because the claim here identifies eight overt acts in furtherance of the conspiracy and the fourth claim in the Central District Action only alleged three acts of mail fraud. The eight overt acts to which Plaintiff refers are alleged on pages 62 and 63 of the FAC. The first alleged overt act occurred in 1987 and the last alleged overt act occurred in 1992. All eight overt acts occurred before Plaintiff filed the Central District Action in 1995. As discussed above, all evidence pertinent to a particular claim must be raised in the initial action. Because all of the events on which Plaintiff's fifth claim are based took place before he filed the Central District action, they could have been alleged in that action. Therefore, the doctrine of res judicata bars them from being re-litigated here.

The same reasoning applies the Plaintiff's argument that the claims are different because in the Central District Action he alleged a RICO claim and here he is alleging a State law conspiracy claim. Because all of the events upon which the conspiracy claim is based occurred before Plaintiff filed the Central District Action, he could have raised that claim under the court's pendent jurisdiction. See 28 U.S.C. § 1367 (a) ("in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy..."). Therefore, Plaintiff is barred from litigating the conspiracy claim here because res judicata prohibits the re-litigation of any claim that could have been raised in the prior action.

Plaintiff also argues that under California law, the Court must apply the primary rights theory to determine if there is an identity of claims. However, as discussed above, the Court must apply federal res judicata law, which provides that two claims are "identical" for the purposes of res judicata if they arise from the same transaction or series of transactions. Two events are part of the same transaction or series of transactions where the claim share a factual foundation such that they could have been tried together. As discussed above, the claims at issue here share a factual foundation such that they could have been tried together.

The three elements necessary for the operation ore res judicata are met. Therefore, Plaintiff is barred from re-litigating his claim for conspiracy. This claim is dismissed with prejudice because Plaintiff will not be able to amend the pleading to remedy this deficiency.

III. Sixth Claim

Defendant provides several grounds for dismissing Plaintiff's sixth claim alleging a RICO violation, but primarily focuses on the ground that the claim is barred by RICO's four-year statute of limitations.

The statute of limitations for a civil RICO claim is four years. Agency Holding Corp. v. Malley-Duff & Asssoc. Inc., 483 U.S. 143, 156 (1987). The Ninth Circuit follow the injury discovery rule for determining when a civil RICO claim accrues. Grimmett v. Brown, 75 F.3d 506, 511 (9th Cir. 1996). The limitations period begins to run when a plaintiff knows or should have known of the injury that underlies his or her cause of action. Id. at 510-11. The plaintiff need not be aware that the injury is part of a pattern of racketeering for the period to being to run. Id. at 510. The Ninth Circuit also follows the separate accrual rule which provides that a new cause of action accrues for each new and independent injury that is incurred within the limitations period, even if the

RICO violation causing the injury occurred more than four years before. Id. at 512. Under the separate accrual rule, an act which will restart the statute of limitations must: (1) be a new and independent act that is not a mere reaffirmation of a previous act; and (2) inflict new and accumulating injury on the plaintiff. Id. at 513.

Plaintiff's sixth claim is titled, "A Civil RICO Action Alleging an Ongoing Scheme to Deprive the Plaintiff of Funds on Deposit at Defendant Bank." In the sixth claim, Plaintiff alleges that "defendants' racketeering activities involved numerous acts of mail fraud, at least 26 such acts during the plaintiff's banking relationship from January, 1982 through April, 1986, 2 acts of mail fraud with respect to the production of the forged bank statement copies...in August, 1990, and 9 acts of mail fraud, ...in the four civil actions that have had jurisdiction over the conspiracy cause alleged in Cause V, all acts being in furtherance of a scheme to deprive the plaintiff of possession of funds on deposit in four accounts identified in Causes I-IV." FAC ¶ 272. In ¶ 333 of the FAC, Plaintiff alleges that he reported wrongful postings on three checking accounts to the managers of Defendant's branches throughout his banking relationship with Defendant and he reported the unauthorized transactions to Defendant's legal department in May, 1984, and in October, 1985. In ¶ 334 of the FAC, Plaintiff allege that he discovered further irregularities in his checking account after he filed a bankruptcy petition in 1986. In ¶ 335 of the FAC, Plaintiff alleges that in 1986, he had knowledge that he could file a RICO claim against Defendant based upon his claims that Defendant illegally withdrew funds form his accounts, and discussed the filing of a RICO claim with an attorney but decided not to do so at that time.

According to the FAC, Plaintiff's injuries from Defendant's illegal withdrawal of Plaintiff's funds on deposit at Defendant's bank branches arose in 1982 through 1986 and by 1986 Plaintiff had actual knowledge

of these injuries. Thus, the limitations period for a RICO claim based on the twenty-six acts alleged by Plaintiff expired in 1990. Plaintiff also alleges that Defendant engaged in predicate acts in 1990 with respect to the production of forged bank statements. However, as evidenced by Plaintiff's pleadings in his 1991 complaint filed against the Defendant and five individuals in the Los Angeles Superior Court, by at least 1991, he had knowledge of this RICO injury. See Def.'s Req., Ex. 23, Plaintiff's Civil Complaint for Damages for Conspiracy and Deceit, ¶ 64. Thus, the limitations period for a RICO claim based on the two 1990 predicate acts expired in 1995, four years after Plaintiff knew about the injury.

Plaintiff filed this action in 2000. Thus, absent the separate accrual rule, Plaintiff's RICO claim is time-barred.

Plaintiff alleges that Defendant committed predicate acts as late as 2000. However, the alleges predicate acts that occurred after 1990 involve the Defendant's attempts to defend itself in the various civil lawsuits Plaintiff filed against it. Asserting a defense in a proceeding brought my another is not actionable. Mir v. Little Company of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988) ("A party 'cannot start a suit...and then sue the defendant for refusing to default.'"). Furthermore, a defendant's utilization of the tools of the adversarial process in a vigorous defense, after having been hailed into court by an opposing party, is protected by procedural due process rights guaranteed by the Fifth and Fourteenth Amendments. Falise v. American Tobacco Co., 94 F.Supp. 2d 316, 352 (E.D.N.Y. 2000).

Thus, the defenses that Plaintiff alleges Defendant raised in Plaintiff's prior civil lawsuits are not predicate acts for purposes of a RICO violation and are not new and independent acts which inflicted new and accumulating injury for purposes of the separate accrual rule. Therefore, the statute of limitations on Plaintiff's RICO claim, which is based on predicate acts that took place in

the late 1980's and in 1990, expired long before he filed this lawsuit in 2000.

Plaintiff does not address the Defendant's statute of limitations argument in his opposition, but he does so in his supplemental opposition. Citing Webster v. Omnitition Int'l Inc., 79 F.3d 776 (9th Cir. 1996) and Blake v. Dierdorff, 856 F.2d 1365 (9th Cir. 1988), Plaintiff argues that his allegations that Defendant filed motions raising fraudulent defenses in this action and predecessor actions state a claim of mail fraud in furtherance of a racketeering scheme and thus his RICO claim is filed within the requisite time period.

In Webster, the court considered what constitutes an inherently fraudulent pyramid scheme for purposes of several federal anti-fraud statutes, including RICO. Webster, 79 F.3d at 779. In Blake, the court considered whether a complaint alleging that misrepresentations were made to the plaintiff, in person, over the telephone, in press releases, in annual and quarterly reports and in stock offering statements, was sufficient to meet the requirement that fraud be plead with particularity. Blake, 856 F.2d at 1367-68. In neither case did the court address predicate acts involving the defendants' filing motions raising fraudulent defenses to a lawsuit. Therefore, these cases fail to support Plaintiff's theory that Defendant's alleged actions in prior lawsuits constitute predicate acts for purposes of RICO. Furthermore, the fact that Defendant's motion to dismiss this action on grounds of res judicata was unsuccessful does not indicate that the defense was fraudulent. The motion raised complex legal questions that the Court addressed in its March, 2001 Order. There is no indication that the motion was fraudulent or made in bad faith. Plaintiff appears to be improperly equating Defendant's right to defend itself with fraudulent or bad faith activity.

Therefore, Plaintiff's RICO claim must be dismissed because it was not filed within the statutory four-year

period. This claim is dismissed with prejudice because Plaintiff will not be able to amend the pleadings to remedy this deficiency. For the same reason, this claims is also dismissed against the Defendants named for the first time in Plaintiff's FAC that have not yet been served. See Silverton v. Dep't of Treasury, 644 F.2d 1341, 1345 (9th Cir. 1981) (court may sua sponte dismiss action as to defendants who have not moved to dismiss where defendants are in a position similar to that of moving defendants or where claims against such defendant are integrally related).

CONCLUSION

For the foregoing reasons, the Court grants Defendant's motion to dismiss. (Docket $ 51). Claims one through four are dismissed without prejudice to refiling should Plaintiff be able to obtain the requisite order of abandonment from the bankruptcy court discussed above. Claims five and six are dismissed with prejudice.

/s/ CLAUDIA WILKEN
CLAUDIA WILKEN
United States District Judge

Dated: January 28, 2003

Copies mailed to counsel
as noted on the following page

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CIVIL ACTION CV-00-0188CW

WAYNE T. ZIEGLER,
Plaintiff,

v.

BANK OF AMERICA,
Defendant

JUDGMENT

For the reasons set forth in this Court's Order Granting Defendant's Motion to Dismiss,

IT IS HEREBY ORDERED AND ADJUDGED:

That Plaintiff, Wayne T. Ziegler take nothing, that claims one through four are dismissed without prejudice to refilling should Plaintiff be able to obtain the requisite order of abandonment from the bankruptcy court, claims five and six are dismissed with prejudice, and that each party bear its own costs of action.

Dated: January 28, 2003

/s/ Claudia Wilken
CLAUDIA WILKEN
United States District Judge

Copies mailed to parties as
noted on the following page:

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 03-15315

WAYNE T. ZIEGLER
Plaintiff-Appellant

v.

BANK OF AMERICA, NT & SA; et al
Defendants – Appellees

And,

GEORGE W. COOMBES, Jr.; et al
Defendants

Appeal from the United States District Court
For the Northern District of California, Oakland

ORDER

Before: O'SCANNLAIN, SILER*, and HAWKINS, Circuit Judges.

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* The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

The panel has voted unanimously to deny the petition for rehearing. Judges O'Scannlain and Hawkins voted to deny the petition for rehearing en banc, and Judge Siler so recommended.

The full court has been advised of the petition for rehearing en banc and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

Date Filed: July 27, 2004

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 03-15315

WAYNE T. ZIEGLER
Plaintiff-Appellant

v.

Bank of America, NT & SA; et al
Defendants – Appellees

And,

George W. Coombes, Jr.; et al
Defendants

Appeal from the United States District Court
For the Northern District of California
Claudia Wilken, District Judge, Presiding

REQUEST FOR RE-HEARING EN BANC

The appellant's petition for re-hearing is based on the Appeals Court's apparent overlooking of four important matters addressed in the briefs filed by the parties in this appeal that were not clearly discussed in the Court's memorandum:

1) The material facts presented in the appellant's briefs established how the appellant had standing to represent his estate's interests in Causes I–IV, based

upon the U. S. Supreme Court Case Johnson v. Collier 222 U. S. 538 (1911). This Appeals Court failed to follow this precedent and the court's memorandum failed to explain why the case was inapplicable in this appeal.

2) In the Statement of Facts in appellant's opening brief(pgs. 36-37) and in the appellant's reply brief(pg. 7), the appellant explained how in the prior action filed in Houston, Texas, the Fifth Circuit Court of Appeals, in Appeal 98-20583, rejected the bank's res judicata defense asserting Cause V of the complaint in this action was barred by the civil RICO dismissal in Case 95-2706GHK. This Appeals Court's decision on Cause V now creates a conflict between the two Circuit Court of Appeals.

3) The material facts and evidence in the appeal record, as described in the appellant's briefs, clearly explained how Cause V, alleging a conspiracy under California law to produce forged bank statements for the estate's Lodi Main and Noe Valley accounts, was supported by significantly more wrongful acts and substantially more evidence than the facts and evidence supporting the civil RICO cause involving the Lodi Main account raised in Case 95-2706GHK, and therefore the causes of action are not identical. Further, the wrongful acts in support of Cause V also involve the bank's infringement on the appellant's right to recover funds in the Arden-Ethan, Noe Valley and Downey-Paramount checking accounts, which were rights not addressed in the civil RICO cause of action involving the Lodi Main account adjudged in Case 95-2706GHK.

4) This Appeals Court found that Cause VI, alleging a civil RICO cause, was barred by the dismissal of the civil RICO cause in Case 95-2706GHK. Cause VI in the original complaint was originally plead as a conspiracy under California law to deprive the estate creditors of funds in the accounts identified in Causes I-IV, which

the trial court dismissed based on the immunity privilege in California Civil Code §47. In the appellant's reply brief(pages 24-26), the appellant explained how the trial court had erred in concluding that the same wrongful acts alleged in Cause V that were not subject to immunity pursuant to C.C.P. §47(2), were subject to the immunity in the conspiracy to deprive the estate of funds on deposit. The appellant asked this Appeals Court to grant the appellant permission to restate Cause VI as a conspiracy to deprive the estate of funds on deposit. The Appeals Court's memorandum had no discussion permitting or denying this request.

The appellant's petition will support these four points with appropriate citations to the record and to the appellants' and appellee's briefs, hopeful in presuming this Appeals Court overlooked some of these material points, and that the Appeals Court would consider these material facts and relevant federal law in issuing a final decision deciding this appeal.

1. The Appeals Court failed to follow the precedent established in Johnson v. Collier

The Appeals Court cited First Nat'l Bank of Jacksboro v. Lasater 196 U. S. 115 (1905), in its memorandum holding a debtor lacks standing to pursue unscheduled estate claims. This Court affirmed this rule in Cusano v. Klein 264 F.3d 936 (2001), advising the debtor of the obligation to re-open their bankruptcy case and file amended schedules listing any pre-petition asset claims.

The appellant's opening brief(pg. 19) explained how the appellant re-opened his Chapter 7 case in 1990, and filed amended asset schedules identifying pre-petition funds, served the schedules on the U. S. Trustee, and the original trustee, Ms. Lorraine Loder, who wrote a letter to the Honorable Judge Dooley stating that a

trustee would not be appointed to pursue any legal action until the debtor recovered the funds(RE, Ex. 20). The appellant also obtained the Bankruptcy Court's approval to pursue the estate's litigation(opening brief, pg. 23).

The facts involved in the appellant's bankruptcy case history differ markedly from First Nat'l Bank(supra) because the appellant did file schedules showing the estate assets after re-opening his Chapter 7 Case, and did bring these assets to the attention of the U. S. Trustee in a letter dated September 20, 1990. This debtor did not conceal estate assets from the U. S. Trustee or the Honorable Judge Dooley in the exchange of verbal discussions and paper documents filed in 1990 and 1991. Appellant's opening brief(pages 39-43) explains how the U. S. Supreme Court, in Johnson v. Collier, 222 U. S. 538 (1911), formulated the rule that when a debtor has scheduled legal claims, and brought those claims to the attention of the trustee, and the trustee elects not to intervene, the debtor has standing to represent the estate's interests in litigation to recover the estate's assets. In 1991, an attorney in the Office of the U.S. Trustee in Los Angeles informed the appellant that he had standing to represent his estate pursuant to this Supreme Court decision. The case, First Nat'l Bank of Jacksboro v. Lasater(supra), would be applicable if the appellant had never re-opened his bankruptcy case and filed amended asset schedules. However, this debtor has always known of his obligation to his estate creditors.

The Johnson v. Collier(supra) case has identified three qualifiers for this binding precedent to apply: 1) The debtor must file schedules of estate claims, 2) the debtor must bring any potential legal claims to the attention of the trustee, and 3) the trustee must elect not to intervene on behalf of the estate creditors.

The appellant's opening brief and record excerpts support the fact that the appellant performed the first

two actions in 1990, and that the trustee expressed in a letter the intent not to intervene in May, 1991. There is no language in the Johnson v. Collier(supra) decision that suggests the rule of law does not apply to a re-opened bankruptcy case. Accordingly, the appellant has standing in Causes I – IV based on the binding rule of law established in Johnson v. Collier(supra).

2. The Fifth Circuit Court of Appeals rejected the bank's claim in the prior Appeal 98-20583 that Cause V in the complaint was barred by the civil RICO dismissal in Case 95-2706GHK; this Appeals Court's contrary decision creates a conflict between the Circuits.

In Statement of Fact 12 of appellant's opening brief(pgs. 36-37), the appellant explained how the question whether Cause V alleging the conspiracy to produce forged bank statements was barred by the civil RICO dismissal in Case 95-2706GHK had already been decided against the bank by the Fifth Circuit Court of Appeals in the prior federal appeal.

Res judicata applies as much to defenses raised as to causes of action.

50 Corpus Juris Secundum §774, Defenses Adjudicated in Former Action.

Matters of defense adjudicated against the defendant in a previous action may not again be setup by the defendant either as a defense in further litigation or as the basis of a new action by him or her against the former plaintiff.

The appellant's opening brief explained that the conspiracy cause alleged in Case 97-1492 alleged the same three overt acts alleged in L.A.S.C. Case

BC033836: 1) the theft of the estate's bank statements in 1987, 2) the production of forged bank statements for Lodi Main account in 1988, and 3) the production of forged bank statements for Noe Valley account 2553-09736 in August, 1990(Doc. 15, Ex. 42, pg. 47). The trial court found the cause barred by res judicata.

The appellant explained in his reply brief in Appeal 98-20583 that the civil RICO action filed in Case 95-2706GHK alleged the 3 acts of mail fraud, the Lodi Main forged production, with the two additional alleged acts of mail fraud not plead in the conspiracy cause, and for that reason the causes did not share the same nucleus of facts(Doc. 57, Ex. 10, pgs 25-26).

The Fifth Circuit Court of Appeals did not affirm the trial court dismissal of Cause V, or any other cause, on res judicata grounds. The Appeals Courts did uphold the dismissal on the alternative grounds that the causes were time-barred under Texas law(RE, Ex. 30, pgs 24-25).

The Fifth Circuit determined that the dismissal on the merits of the civil RICO cause in Case 95-2706GHK, alleging a scheme to deprive the appellant of funds in Lodi Main account 1072-03354 in the two prior California proceedings, did not equate to a civil conspiracy to produce forged bank statements for the Lodi Main and Noe Valley accounts, and justify application of res judicata to that cause.

3. This Appeals Court's conclusion that Cause V alleging a civil conspiracy to produce forged evidence is identical to the civil RICO cause plead in Case 95-2706GHK is not supported by the evidence

A. The civil RICO cause and conspiracy to produce forged bank statements for Lodi Main and Noe Valley accounts (Cause V) are not provable based on the same evidence.

This Appeals Court's memorandum concluded that Cause V alleging a conspiracy under California law to produce forged bank statements for the Lodi Main and Noe Valley accounts and the civil RICO cause specific to the Lodi Main account plead in Case 95-2706GHK, were identical. Reasonableness, which is a standard adhered to in all judicial systems, would support the conclusion that if two causes of action were identical, then the same evidence would prove both causes of action.

This Appeals Court adopted this as a rule of res judicata in this Circuit in Costantini v. Trans World Airlines 681 F.2d 1199 (1982), the Court explaining, "...whether substantially the same evidence is presented in two actions."

The appellant, in Statement of Fact 11, of his opening brief(page 34), explained how the Lodi Main forged statement production could be proven false evidence based solely on the original signature card, and how the appellant construed the bank's motion for a protective order in the Bankruptcy Court to block inspection of the signature card, and its repudiation of a letter dated January 8, 1992, promising inspection of the signature card, as acts of mail fraud since they were served through the U. S. Mails. As the original forged Lodi Main statements were also sent through the U. S. Mails, the appellant construed these 3 actions as a civil RICO scheme to deprive the estate of recovery of funds on deposit in the Lodi Main account 1072-03354 in the two prior civil proceedings. This is the wrong alleged in the civil RICO cause plead in Case 95-2706GHK.

The evidence supporting this civil RICO cause, as identified in the appellant's reply brief(pgs. 8-9), can be reduced down to these six documents:

1) The Lodi Main account forged statement production(RE, Ex. 13)

2) The bank's motion for a protective order in the Bankruptcy Court case imposing a fraudulent objection to the debtor's standing to obstruct legitimate discovery requests(Tab 2T).

3) The Bankruptcy Court order granting the protective order(Tab 2U)

4) Ms. Young's January 8, 1992, letter promising to allow inspection of signature cards at hearing on January 10; 1992(RE, Ex. 22).

5) The Lodi Main account 1072-03354 original signature card that bank counsel deliberately withheld, or

6) The reconstructed Lodi Main bank statements for the first six months the account was open filed with the court(RE, Ex. 17, pgs. 1-10).

In the appellant's reply brief(pgs. 9-10), the appellant explained how much the additional evidence in support of the conspiracy to produce forged evidence was substantially more, as outlined below, than this evidence supporting the civil RICO cause, none of which evidence was needed to support the civil RICO cause:

1) The B&A Self-Storage check copy identifying Bank of America as having a business relationship with the business that held the illegal sale to cover up the theft of the estate's original bank statements.

2) The Noe Valley account forged statement production(RE, Ex. 14).

3) The bank's Vexatious Litigant motion filed in L.A.S.C. Case BC033836 to invoke the stay provision of

the statute and imposing the fraudulent claim the Bankruptcy Court entered the protective order because the depositor had engaged in frivolous conduct(Tab 2Y).

4) The depositor's opposition to the bank's vexatious litigant motion

5) The bank's objections to the depositor's inspection requests in L.A.S.C. Case BC033836 invoking the stay provision as the grounds.

6) The depositor's motion to compel inspection of documents
(RE, Ex. 26)

7) The bank's opposition to the depositor's motion to compel

8) The bank's demurrer filed in L.A.S.C. Case BC033836 imposing fraudulent account stated defenses to both forged statement productions(Doc. 5, Ex. 63).

9) The depositor's opposition to the bank's demurrer imposing fraudulent account stated defenses.

10) Respondent's brief in Appeal B065122 imposing fraudulent account stated defenses to both forged statement productions.

11) Appellant's reply brief in Appeal B065122 explaining how the forged bank statements failed to conform to the original statements

12) The copy of the original July 16, 1984, Timesaver statement proving the forged Lodi Main statements were not a printed copy of the statement generated on a Timesaver checking account(RE, Ex. 20).

13) The reconstructed Lodi Main account 1072-03354 statements for the years 1983-1985(RE, Ex. 7, pgs. 11-74)

14) The reconstructed statements for accounts whose activity is included on the forged Noe Valley account 2553-09736 bank statements.

1) Noe Valley account 2552-09736(RE, Ex. 9)
2) Noe Valley account 2553-09736(RE, Ex. 10)
3) Downey-Paramount account 05646-03919(RE, Ex. 11)

The evidence supporting the civil RICO cause of action in 1995 proved only that the Lodi Main production was forged evidence. The evidence in support of the conspiracy to produce forged statements in Cause V of this action supports the claim that the bank produced two forged bank statement productions with checking activity from 8 different checking accounts the appellant had maintained with the bank between 1981 and 1986. The appellant has clearly shown how the evidence required to support the civil RICO cause does not prove Cause V alleging a civil conspiracy to produce forged evidence for two checking accounts. The fact that the civil RICO Cause in Case 95-2706GHK relied on some of the evidence that supports the conspiracy to produce the forged Lodi Main and Noe Valley statements is certainly not a basis for concluding that the causes of action are identical.

B. The civil RICO Cause(95-2706GHK) and conspiracy to produce forged statements for Lodi Main and Noe Valley accounts(Cause V) are not based on the same nucleus of facts.

The appellant's opening brief(page 45) identified eight overt acts in furtherance of the conspiracy to produce

forged evidence, of which the civil RICO cause shared 3 facts. The bank's vexatious litigant motion in Case BC033836 was also an overt act(this act is alleged in Cause V, but was inadvertently omitted from the appellant's brief). When Cause V alleges 9 acts, 3 of which are in common with the civil RICO cause plead in Case 95-2706GHK, clearly the two causes of action arenot based on a common nucleus of facts.

In the appellant's opening brief(pgs. 46-48), the appellant identified 12 additional overt acts in support of the conspiracy to produce forged evidence that were committed between 1982 and 1986, which are includable in Cause V by amendment. These additional facts demonstrate how the conspiracy to produce forged evidence had its genesis in 1982, and continued through 1992 with the bank's filing of respondent's brief in Appeal B065122. Thus, the malice behind the 21 wrongful actions includable in the amendable conspiracy cause span a period of 10 years, and further demonstrate that the two causes are not even similar. The civil RICO cause plead in Case 95-2706GHK only alleged 3 acts of mail fraud between 1988 and 1992.

The appellant believed it was important to stress in his opening brief the breadth of the wrongful overt acts in furtherance of the conspiracy to produce forged statements for the Lodi Main and Noe Valley accounts since a cause of action should incorporate all of the wrongful conduct properly includable.

C. The civil RICO cause and conspiracy to produce forged statements for Lodi Main and Noe Valley accounts(Cause V) do not involve the infringement of the same rights

The appellant discovered just prior to filing this action that the California legislature had passed legislation exempting from immunity fraudulent actions in court proceedings involving forged

evidence(Cal.Civil.Code §47(2)), which is why Cause V in this suit additionally included the overt acts in furtherance of the conspiracy bank counsel committed while LA.S.C. Case BC033836 was pending.

In Costantini v. Trans World Airlines(supra), this Appeals Court defined as one of the criteria in evaluating whether two causes of action are the same, "...whether the two suits involve infringement of the same right".

The civil RICO cause plead in Case 95-2706GHK, simply stated a scheme that involved the bank's infringement of the appellant's right to the return of funds on deposit in the appellant's Lodi Main account 1072-03354.

The substantive rights infringed upon by the bank's conspiracy to produce forged evidence are more involved. Every plaintiff, upon commencement of a suit, has the right to a fair hearing, to conduct discovery, and to access witnesses.

As the appellant has identified on pages 9, 10, of this petition, bank counsel wantonly infringed on the depositor's constitutional rights to a fair hearing in L.A.S.C. Case 033836; imposing fraudulent account stated defenses, fabricating misconduct that it accused the depositor of so counsel could declare the depositor a vexatious litigant, and by willfully refusing to comply with legitimate discovery requests, each wrongful action constituting an infringement of the appellant's constitutional and due process rights to a fair hearing. To describe these overt acts in furtherance of the conspiracy as simply an infringement on the depositor's right to recover funds in that proceeding would be a serious understatement, considering how constitutional values are the most treasured values revered by this country's citizenry.

As documented in Causes I-IV of the complaint, the depositor has funds on deposit in four checking accounts. To the extent that the bank interfered with

the depositor's right to recover funds in these accounts, by engaging in overt acts in furtherance of the conspiracy to produce forged evidence, the bank was committing separate infringements of the depositor's right to funds to each checking account. Thus, in summarizing all of the wrongful actions bank counsel committed in Case BC033936, in the simplest terms the bank infringed on the appellant's right to recover the funds deposited in all four checking accounts.

Of course, this is what distinguishes the conspiracy to produce forged evidence from the civil RICO cause, the overt acts in furtherance of the conspiracy to produce forged evidence involved multiple infringements on the plaintiff's due process rights, and separate infringements on the depositor's right to the return of possession of funds in four checking accounts. By characterizing in its memorandum that Cause V and the civil RICO cause were identical, the Appeals Court apparently construed a conspiracy to produce forged evidence as analogous to a scheme to deprive a depositor of funds. Indeed, Cause V, as presently plead, involved the bank's infringement of the depositor's right to funds in four checking accounts, whereas the civil RICO cause plead in Case 95-2706GHK involved the infringement of the estate's right to funds in only Lodi Main account 1072-03354. A conspiracy to deprive a party of funds in four accounts is not equivalent to a scheme to deprive a party of funds in one account, since a depositor has a distinguishable primary right to funds in each account.

For the reasons stated above, Cause V alleging a conspiracy to produce forged evidence for two checking accounts involved the infringement on the depositor's right to funds in three other checking accounts that were not addressed in the civil RICO cause in Case 95.2705GHK alleging a scheme to deprive the estate of funds in Lodi Main account 1072-03354, and therefore

the causes do not involve the infringement of the same rights.

4. The Appeals Court failed to decide if the appellant could amend Cause VI to restate the cause as originally plead in the original complaint alleging a conspiracy to deprive the estate of funds on deposit.

In the appellant's reply brief(pgs 24-26), the appellant explained to this Appeals Court how in the original complaint Cause VI had been a timely plead cause alleging a conspiracy under California law to deprive the estate creditors of funds on deposit in the four checking accounts identified in Causes I – IV.

The trial court initially ruled that the wrongful actions were subject to the immunity privilege pursuant to California Civil Code §47, and the appellant's opposition explained that the wrongful actions were not subject to the immunity privilege pursuant to California Civil Code §47(2) in the context of a conspiracy to deprive the estate of rightful possession of funds.

The trial court conceded that the wrongful acts were subject to immunity in Cause V alleging the conspiracy to produce forged evidence, but were not in the context of a cause of action alleging a conspiracy to deprive the estate of funds. In the appellant's reply brief, the appellant pointed out that there is nothing to be inferred from the exemption language adopted by the California Legislature in Civil Code §47(2) that suggests that the immunity applies only to conspiracies to produce forged evidence. The appellant believes the legislative intent is that the immunity applies whenever a party produces forged evidence with an ulterior purpose and engages in subsequent fraudulent acts in court proceedings in furtherance of that purpose.

Cause VI was timely filed within 3 years of the last overt act in the Houston action, resulting from the bank's imposition of a fraudulent res judicata defense to avoid the responsibility to return the funds to the estate.

If the Appeals Court agreed that the actions were not subject to immunity, then the appellant would plead Cause VI(the current RICO action) as presently plead as a civil conspiracy under California law based on the same facts, and it would be a timely filed cause of action.

The appellant would merely ask that the Appeals Court review the question as presented in the appellant's reply brief, and as explained further herein and incorporate a decision on this question in its memoranda. Alternatively, the Appeals Court may prefer to direct the question back to the trial court for further briefing by the parties.

5. CONCLUSION

In 1991, an attorney in the Office of the U. S. Trustee in Los Angeles advised the appellant that he had standing to pursue the estate's claims to funds on deposit pursuant to Johnson v. Collier 222 U. S. 538 (1911). The appellant would request that the Appeals Court incorporate in a revised memorandum an explanation why this Supreme Court is not considered applicable.

The appellant filed this petition primarily to avoid there being conflicting decisions between the Circuit Court of Appeals on the question whether the dismissal of the civil RICO action in Case 95-2706GHK barred the appellant's conspiracy to produce forged evidence cause(Cause V). The appellant believed that he had sufficiently shown in appellant's briefs, and again in this petition, how the conspiracy to produce forged evidence is an entirely distinguishable cause of action,

from the civil RICO cause in Case 95-2706GHK, and how the Appeals Court arrived at an erroneous conclusion in its initial memorandum.

This Appeals Court is the second federal Appeals Court that has had evidence in the record proving that Bank of America produced forged bank statements for two checking accounts(Record Excerpts, Volume 1). As important as the issues are in this appeal, where the appellant has proven that the bank embezzled funds from a depositor, and then produced forged bank statements for two of the depositor's checking accounts, the appellant must acknowledge his disappointment that the Appeals Court did not, in the appellant's estimate, discuss the facts and issues in this appeal beyond a two-page memorandum.

The appellant has already advised Bank of America's management that the appellant will be providing the record before the trial court to the House Banking Committee with a recommendation to pass legislation requiring all national bank's to put measures in place that would prevent bank employees from creating altered records for a bank depositor. The appellant is hopeful that this Appeals Court will be objective in making its final determination of the issues raised on this appeal.

For the reasons stated herein, the appellant requests that the Appeals Court revise its memorandum to explain why the Johnson v. Collier case is not applicable in the case before this Appeals Court, and to explain more fully why the Appeals Court is convinced that the civil RICO cause in Case 95-2706GHK bars Cause V alleging a conspiracy to produce forged evidence, and that the Appeals Court also address the appellant's request to be permitted to amend Cause VI to state a civil conspiracy to deprive the estate of funds on deposit in Causes I – IV.

Date: June 17, 2004

/s/ Wayne T. Ziegler
Wayne T. Ziegler, appellant

APPENDIX E

Wayne T. Ziegler
2238 S. Piney Point Rd #206
Houston, TX 77063
(713) 784-6328
attorney in pro se

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CIVIL ACTION CV-00-0188CW

WAYNE T. ZIEGLER,
Plaintiff,

v.

BANK OF AMERICA,
Defendant

DECLARATION OF PLAINTIFF, WAYNE T. ZIEGLER, ESTABLISHING A PRE-EXISTING RELATIONSHIP WITH DEFENDANT, BANK OF AMERICA N.T. & S.A.

I, Wayne T. Ziegler, do hereby declare the following is true:

1. I am a plaintiff in District Court Case C 00 0188 BZ, apearing in said action in pro se on behalf of myself, and my bankruptcy estate creditors. I have personal knowledge of the facts stated in this declaration and, if called as a witness, would testify competently thereto.
2. In May, 1960, I entered into an agreement with a Bank of America representative to disavow authorship

over the poem, "Tender Bell", and related works. The purpose of the agreement was to reduce public scrutiny of the bank's decision to prosecute a bank customer that I had nicknamed, "Mongo", who had assaulted a bank employee while the employee was in the act of repossessing Mongo's car under the terms of the bank's VSI policy. The bank's representative professed that this goal could best be achieved by minimizing my "recognition factor".

3. My recognition factor in 1960 was attributable to three sources: 1) my belief that indeterminate criminal sentences were unconstitutional, 2) my authorship of the poem, "Tender Bell", to expose the conduct of doctors in Santa Cruz who had kidnapped my collie, Bell, out of spite for that belief, and 3) my creation of "The Bell Symbol", and its related interpretations. The impact of my creations reached its height in May, 1960, when I was introduced to the family of Steve Bechtal, Sr., whose family had taken an interest in fostering my musical capabilities.

4. While my musical capabilities were respected and appreciated in the local music field, my perspective on indeterminate sentences created a rebellious identity in the legal and medical professions. In 1960, this identity was secondary to my popularity in music circles arising from my authorship of "Tender Bell"(Exhibit 2), and "The Bell Symbol" (Attachment 6) among other works. Because "Tender Bell" was written to the song, "Clare de Lune" (itself one of the most recognizable classical songs in music history), and as a lyric, was nearly a phonetic match to the music, the poem attracted a significant amount of attention from local music interests.

5. My agreement to disavow authorship over "Tender Bell" and the other works was largely based on my concern that doctors harboring antagonistic attitudes towards me might direct their hostility towards my brothers, as well. At the age seven, I recognized that as time went on, and the poem attracted more interest in the field of music, it would also attract greater criticism in the me-

dical community, and this criticism could eventually affect other members of my family.

6. I was also aware that if the controversy surrounding "Tender Bell" continued, it would adversely affect Mongo's prospects for release from the mental hospital. Accordingly, I entered into the agreement with the bank expecting that there would be a return to normalcy in my family life. In agreeing to the bank's request, I advised the bank's representative that I would abide by our "gentleman's agreement" as long as the bank did not interfere in my life.

7. While in the fourth grade, school officials compelled me to create a version of the poem that eliminated the tragic overtones inherent in "Tender Bell". School officials justified this on the basis that the "Tender Bell" had continued to circulate in music circles, and school officials wanted a version of the poem that was not controversial. I proceeded to change part of the poem, which I titled, "Only Bell(Attachment 7).

8. In the second half of my fourth grade experience and continuing into my fifth grade experience, school officials required me to meet with a school selected psychiatrist for the purpose of allowing the psychiatrist to impart suggestions with the goal of repressing all memory of my having written "Tender Bell". These efforts included planting the suggestion that Bell had been kidnapped near Halloween, to make the circumstances surrounding her kidnapping appear less sinister.

9. When the psychiatrist attempted to plant suggestions to the effect that I never wrote a poem titled, "Tender Bell", I planted on myself the suggestion to recall "Tender Bell" upon turning 42 years of age, and reinforced this suggestion by tying this recollection to the second 90 degree shift of "The Bell Symbol"(The phases of "The Bell Symbol" are described fully in the detail testimony that follows this summary).

10. In 1974, defamatory verbal attacks of Bank of America employees in Marin County encouraged me to recall

the poem, and I was able to recall "Only Bell"(Attachment 7), and at the time believed that it was the poem that I had authored in 1959. I misplaced the poem shortly thereafter.

11. After the Bank of America pushed me into bankruptcy in 1986, I again applied myself to recalling the poem. At that time, I did not even remember that it had been written to "Clare de Lune". In the spring of 1988, just after filing my first action in Sacramento Superior Court, I recalled the poem, "Only Bell", again, still under the impression that this was the poem I had originally authored in 1959. I also recovered from repressed memory, "The Bell Symbol"(Attachment 6), and two short stories I had authored, "Kashmir"(Attachment 2) and "Home"(Attachment 5).

12. In December, 1994, much to my surprise, I felt my attention directed back toward Christmas of 1959, and was able to recall the original poem, "Tender Bell", with specificity, and I recalled many long forgotten facts leading up to my agreement with the bank's representative in May, 1960, that had not been in my conscious awareness since that time.

13. Other outcomes of my recollection process were the second poem, "Pretty Bell"(Attachment 3) that school officials required me to write in 1960, and the poem medical professionals in South San Francisco authored with the ambition of creating an adversarial relationship between the Bank of America and myself, "Trader Bell" (Attachment 4).

14. The recollection process that was triggered by recalling "Tender Bell", also allowed me to recall quite clearly virtually every relevant fact that occurred in 1981, including the relevancy of my Kettleman Lane checking account to the 1982 out-of-court settlement process with the bank. I was also able to bring into sharper focus interactions with bank employees in Marin County between 1965 and 1974.

15. When entering into the agreement with the bank over "Tender Bell" in 1960, I did not evaluate the long-term impact within the bank's organization of the bank's decision to make an agreement with me over the poem. I expected that by disavowing authorship over my creative works, I would also be minimizing my visibility within the bank's organization. This expectation was never realized, as my belief on indeterminate sentences was convoluted by attorneys in the Bank of America's Legal Department into disagreement with bank policy toward insuring the collateral under the bank's secured loan agreement. The Legal Department's denigrating perspective toward me was to become distributed throughout the bank's organization in southern Marin County after 1965, and I encountered it from my teenage years all the way through my college years as detailed in a separate affidavit to the complaint(Exhibit 4).

16. A variety of social interactions contributed to my decision to write the poem, "Tender Bell", relating back to my entry into the California school system. The remainder of this declaration identifies the interactions I had with medical professionals that ultimately led to my agreement with the bank.

SUPPORTING FACTS

17. In August, 1957, my mother enrolled me in kindergarten in San Bruno, California. I was referred to a school-appointed physician who was to administer the basic medical tests required for admittance to public school. The doctor deliberately misdiagnosed that I was dumb, solely on the premise that he believed I was too small to enter public school.

18. Upon my suggestion, my parents sought the opinion of a pediatrician, who after meeting with me at our home, contradicted the school doctor's diagnosis. During the visit, the pediatrician also demonstrated elementary playing technique on our family piano, and discovered

that I had 'a musical ear', which meant that I could play a song simply on the basis of having heard the song once before.

19. School officials allowed me to attend kindergarten. A couple of weeks into the school year, the school doctor held a meeting with me to explain why he had made his diagnosis. The doctor asserted that he had thought he was doing me "a favor" by letting me wait a year. When I admitted having suggested to my parents that they obtain a second opinion, the doctor criticized me for disagreeing with his diagnosis, and threatened, "I'll make you sorry for disagreeing with a doctor, little boy."

20. In December, 1957, my family moved to a house in the Santa Cruz mountains on 12 acres just five miles east of downtown Santa Cruz. As a belated Christmas present, my mom gave me a seven-week old collie pup. I named the pup, Bell, taking the name from one of the ornaments on our Christmas tree.

21. I was enrolled in a two-room schoolhouse located within a 15 minute walk from our house. On my first day at school, while the teacher was introducing me to the class, one boy at the front of the class remarked, "You're lucky we let you in." I responded by saying, "Do you want to go outside and prove it."

22. As a consequence of my verbal encounter with the other boy the first day of class, I earned the reputation for being a troublemaker. To diminish this perception, my teacher allowed me to bring Bell to class one day when Bell was about ten weeks old. Bell's visit had its intended impact, and I had a normal school experience through the remainder of the school year.

23. On the last day of school, I met with the principal, who complemented me on improving my image at school. The principal disclosed that part of my bad image had been based on comments that had been passed on from school officials in San Bruno. The principal confided that outside of school, some adults still considered me 'disrespectful' towards doctors. The principal suggested that I

could eliminate that perspective by agreeing to give Bell away to any of several interested doctors in the area. The principal told me that I would be contacted over the summer about the possibility.

24. By June, 1958, Bell had become a household name in the four-square mile area surrounding the schoolhouse. She had also grown to be a beautiful collie, as Attachment 1 documents.

25. In early July, 1958, my mother allowed a psychologist to meet with me to discuss giving Bell up for adoption. The psychologist met with me one Saturday afternoon, and began the meeting by explaining Freud and Jung's theories of psychology. The psychologist explained that prominent doctors in the community were interested in adopting Bell. In response, I suggested that anyone interested in adopting Bell could adopt one of her pups when that opportunity ventured along.

26. The psychologist had heard that I was musically talented, and also disclosed that doctors liked to sponsor gifted students. The psychologist stressed that by giving Bell away, I would likely receive preferential treatment from doctors in other ways, too. The psychologist suggested that I give the matter a week of thought, which I agreed to do.

27. The psychologist revisited our house the following week. When asked if I had reached a decision, I told the psychologist that I was not interested in giving Bell away. The psychologist indicated that my position would not be well accepted, and he asserted that doctors interested in Bell could have animal control authorities declare Bell a dangerous dog, and that there was nothing that I could do about it. In response, I asserted that Bell was not a dangerous dog.

28. The psychologist then remarked, "Well, she does look mean." I responded spontaneously to the psychologist's remark by saying, "Give me a break." The psychologist accused me of being disrespectful, and told me that

it was only a matter of time before I heard from the animal control authorities.

29. The excessive interest that doctors in Santa Cruz took in Bell ended a couple of weeks later when Bell was bitten by a rattlesnake while accompanying my little brother and I on a short hike on our property. The veterinarian shaved Bell's entire coat off, giving her more the appearance of a greyhound, which helped to reduce the attention local doctors took in her for a while.

30. Over the remainder of the summer of 1958, I was the focus of a local controversy concerning whether I had invented the expression, "Give me a break", and whether I had also been disrespectful toward the psychologist by using the expression. Our neighbor, Rass, told me that local doctors were perpetuating the controversy with the hope of making me look unworthy of having a beautiful collie like Bell.

31. Towards the end of my first summer in Santa Cruz, an interested local doctor came by our house one afternoon to explain how my position on giving Bell away, and the local belief of some that I had invented the expression, "Give me a break", had made me a very popular youth. The doctor explained that my popularity posed a unique problem for the community, providing the community with an opportunity to consider whether it wanted to invest in my popularity in it's own interest. The doctor suggested that I focus on getting good grades in the first grade.

32. Upon turning age six, my parents enrolled me in piano lessons with a private teacher in Santa Cruz. My teacher, Mrs. Gillespie, was a grandmother who took an immediate liking to my talkative demeanor. Mrs. Gillespie was also impressed with my musical ear. Lessons were held once a week on Saturday mornings while my parents attended to chores in town.

33. In the last week of first grade, the principal met with me and disclosed that school officials were very pleased with my grades, and had recommended me to va-

rious individuals in the community, whom I could expect to meet over the summer. The principal emphasized that I would meet important members of the community and that I should put my best foot forward.

34. The first week of June, 1959, Mrs. Gillespie introduced me to a young doctor named Dr. Jeffries during my piano lesson. Dr. Jeffries disclosed that he was a psychiatrist and expressed an interest in helping to foster my musical capabilities.

35. The following weekend, Dr. Jeffries met with me again at my piano lesson, at which time Dr. Jeffries explained his work as a psychiatrist involved in the care and treatment of 'dysfunctional adults' and 'mental defectives' in a mental hospital located in Watsonville. Dr. Jeffries' description of the hospital conditions was fairly depressing. In response, I suggested that a visit by me to the hospital might have a very positive effect on the patients and staff. Dr. Jeffries agreed with my suggestion and offered to look into whether hospital regulations would permit such a visit.

36. At the end of June, Dr. Jeffries conveyed the hospital administration's approval for a visit scheduled for a Wednesday, July 8, 1959. Dr. Jeffries also obtained my parents approval to allow me to visit the mental hospital with him. Dr. Jeffries picked me up at my home at about 8:00 a.m., and we drove to the mental hospital for a two-hour visit with the hospital staff and patients. The visit was structured so that my time would be equally divided between the staff and patients. The first hour was spent visiting with hospital staff.

37. At the beginning of my visit with the patients, Dr. Jeffries obtained a deck of playing cards, and I proceeded to play a couple of hands of fish with a patient by the name of Johnny. Johnny suffered from a nervous and severe stutter. As playing cards had the affect of making Johnny feel anxious, being the focus of attention, I asked the supervising nurse if there was a chess board on the premises.

38. The nurse supplied a chess board, and one of the other patients offered to play me a game of chess. While setting up the pieces, I asked the patient his name. The nurse told me that with the exception of Johnny, the hospital had told the patients not to divulge their names. Over the course of the game, I grew impatient with the patient's careful playing style, and to encourage him to speed up his play, I said, "Come on, Mongo", meaning to say, "Come on, man, move." My Freudian slip made for a brief moment of hilarity and the other patients ascribed the nickname, "Mongo", to the patient.

39. While watching my opponent play, I perceived that there was nothing wrong with Mongo, and I asked him why he was in the hospital. Mongo admitted having committed assault, and that that was why he was there. At the urging of other patients, Mongo explained that he had assaulted an employee of a bank who had tried to take Mongo's car as required by the bank's insurance. Mongo proceeded to explain that the judge had given him an 'indeterminate sentence', adding that he didn't think the judge had been fair because the bank was able to keep his car. Other patients added that Mongo had no idea when he would be released.

40. The visit in the ward came to a rather sudden end when one of the patients made an indiscriminate remark accusing Dr. Jeffries of having a homosexual interest in me. As the nurse was leading me out of the ward, one of the patients commented that I should stay away from the Bank of America. When I turned to observe Mongo's response, he shrugged.

41. On the drive back home, I asked Dr. Jeffries to clarify what an 'indeterminate sentence' was and asked whether Mongo really had one. Dr. Jeffries explained indeterminate as meaning 'indefinite' and confirmed that Mongo had such a sentence. On further reflection, I formed the opinion that indeterminate sentences were cruel punishment and shared my opinion with Dr. Jeffries. Dr. Jeffries was surprised that I knew anything

about constitutional guarantees, and suggested that I see Mongo as being denied equal protection of the laws by the state.

42. The day following my visit, Dr. Jeffries phoned me to clarify the circumstances that had resulted in Mongo's conviction for assault. Dr. Jeffries explained that banks ordered insurance on collateral when the borrower failed to keep his in force, and that the insurance required the bank to repossess the collateral. Dr. Jeffries explained that Mongo had assaulted the bank's agent in the process of repossessing Mongo's car to process a claim.

43. The second day following my visit, Dr. Jeffries communicated to me the hospital administration's surprise that I would see Mongo's sentence as cruel punishment. Dr. Jeffries told me that the hospital wanted me to put my perspective in writing. As I was apprehensive about being able to state my perspective clearly in words, I drew a picture of how I perceived Mongo's incarceration. The picture I drew depicted two very large men with one arm on each other's shoulders, with one of the men holding his foot over a depiction of a very small man. I drew an arrow to the little man, and wrote the name, Mongo.

44. When Dr. Jeffries arrived in the afternoon, I explained that the man with his foot over Mongo represented the state and that the bank had its arm around the state's shoulder, and that the picture reflected what I saw in the indeterminate sentence, a concealed threat to step on the person for the rest of their life. Dr. Jeffries was surprised that I comprehended Mongo's situation in that way, and took my drawing with him to share with hospital administrators.

45. One week after my visit to the mental hospital, Dr. Jeffries arranged to have my piano lesson moved up to Wednesday, and also arranged for me to personally visit with one of the hospital directors at his office in Santa Cruz to participate in 'a hearing test'. The 'hearing test' was a ruse. The doctor spent the first half of my 'hearing test' criticizing me for differing with bank policy. After-

wards, I was led to a room where the doctor wanted me to meet two older boys who were homosexual. The doctor suggested that the real purpose of the meeting was to make sure I was not homosexual.

46. A few minutes after the doctor departed, two boys, one eight and the other ten years of age, came into the room and took seats opposite to mine. After conversing a few minutes, the two boys took off their pants, and the younger boy performed fellatio on the older boy. I mocked the conduct of the two boys.

47. After my visit with the two homosexual boys, the doctor continued to criticize me for disagreeing with established bank practice. The doctor also told me to avoid acting like older teenage boys by voicing comments such as, "I wouldn't suck the bank's dick, I'd sue". I told the doctor that he was distorting my view on Mongo's incarceration, and the doctor criticized me further for disrespecting his authority. Dr. Jeffries gave me a ride back to my house after the meeting concluded.

48. In the second week following my visit to the mental hospital, an interested attorney visited our house to explain Mongo's incarceration from a legal point of view. The attorney explained that when a claim arose while the bank had a borrower's car insured, the bank usually took back the collateral, and paid off the borrower's loan. The attorney explained that in Mongo's case, Mongo had disagreed with the bank taking his car, and that Mongo had assaulted the bank's employee. The attorney explained that in some legal circles, Mongo had merely tried to protect his property from an act of conversion by the bank, and therefore his conduct was justifiable.

49. The attorney's opinion was that the public defender had not properly presented Mongo's defense, or that the Court had ignored it, and that Mongo had been denied due process of law. The attorney suggested that on that basis, alone, Mongo should be let out of the mental hospital. The attorney also explained to me basic constitu-

tional rights, including the minimum rights constituting a fair hearing.

50. At the end of July, my parents divulged that Bell was carrying a litter of pups. As my opinion on indeterminate sentences had set off a new controversy, my parents agreed to Dr. Jeffries' suggestion that I discontinue my piano lessons.

51. Toward the end of the summer, I mailed Dr. Jeffries a written explanation for why I believed indeterminate sentences were unconstitutional, to wit:

a) The purpose of punishment in our society is to discourage an offender from repeating their crime.

b) In our society, the principal form of punishment is the loss of one's freedom.

c) It follows that locking a person in a cell or ward, and not telling them with certainty when their punishment would end, is cruel and unusual punishment.

52. Prior to the start of school, doctors in Santa Cruz persuaded school officials to consider kids who comprehended adult issues as mentally retarded. On my first day of my second grade, the principal interrupted the class at the outset to inform my classmates that "we are unfortunately stuck with that retard, Wayne". When I remarked that the principal's comment was libelous, the principal stormed back to where I was sitting and physically dragged me to the front of the class and threw me into a chair in the front row. The principal then slapped me, giving me a bloody nose. When a fellow student came to my defense, the principal threw the student against the front wall of the classroom, nearly knocking the youngster unconscious.

53. The following day, my father escorted me to school and confronted the principal on his conduct. The principal suggested to my dad that he move our family out of Santa Cruz because I was greatly disliked by school officials and others in the community.

54. Bell gave birth to a litter of eleven pups on September 30, 1959. As rumors of Bell's safety being jeopardized had circulated after my visit to the mental hospital, I tried to elevate Bell's visibility as a measure of protection, by giving five of her pups the unique country names of Sunshine, Moonshine, Moonlight, Fleetwood Mac, and Bell's favorite pup, River. Two of the pups, Sunshine and Moonlight, died two days after birth.

55. By my seventh birthday at the end of November, our family had given away all of Bell's pups. As my parents intended to move closer to San Francisco where my father worked, we also began looking for a new home for Bell. Our closest neighbor referred us to an elderly couple interested in adopting Bell. We gave Bell away to her new owners on Saturday, December 5, 1959.

56. My father started renting an apartment in South San Francisco on December 1, 1959. Plans were made to move family furniture piecemeal on the weekends in December, and move the entire family into the new apartment after January 1, 1960. The weekend of December 5, was the first weekend we began moving furniture. One of the first articles moved was our piano.

57. When the principal of the school in Santa Cruz learned of our planned relocation in November, he suggested to my father that he make arrangements to have me attend class at my new school in South San Francisco as soon as practical. As I was also eager to attend a school where I had no reputation, my dad enrolled me in my new school. On December 7, 1959, I began attending school in South San Francisco.

58. After returning to Santa Cruz after dropping off some furniture, my older brother phoned me the afternoon of Saturday, December 12, 1959, and told me that Bell had been stolen from her new owners. My brother told me her abductors had called and told him that they planned to phone me in South San Francisco.

59. The following evening, December 13, 1959, I received a phone call from a stranger who advised me that

he had Bell, and that she would be killed unless I wrote a song about her. The abductor told me that doctors in Santa Cruz had arranged for my piano teacher to assist me in the effort if I wanted her help, and that I would be given one week. After discussing the demand with my father, we agreed to cooperate with Bell's kidnappers at least until we could learn more about the situation.

60. In the early evening of Monday, December 14, a strangr accompanied by my music teacher, Mrs. Gilles - pie, paid a visit to our apartment in South San Francisco. While I had believed that Bell's kidnapping might be just a hoax, Mrs. Gillespie assured me that Bell's kidnappers impressed upon her that they were serious about hurting her. Mrs. Gillespie and I tried to write a song, but both of us were too unnerved by the situation to concentrate. After an hour, I told the abductor that I would cooperate with his bosses after they proved that Bell was alive.

61. On the early evening of Wednesday, December 16, 1959, a different stranger came by the apartment with Bell. When I failed to write a song, or to have a song for him to take back with him, the stranger told me that the people running things were serious about killing Bell. The stranger and I agreed upon one last visit that was set up for Friday evening.

62. After Bell's first visit on Wednesday, I gave serious thought to the expectations of Bell's abductors. I was convinced that even if I were to compose a song, it would likely fail to satisfy Bell's kidnappers. I perceived Bell's kidnapping, then, as doctors in Santa Cruz purely trying to punish me for not giving Bell away to one of their fraternity, or as punishment for my views on Mongo's indeterminate sentence.

63. By the time Bell and her escort arrived on the evening of December 18, 1959, I had decided that even if I wrote a song, no one would learn of it. I also felt that whoever had planned Bell's kidnapping needed to be taught a lesson, and a poem about Bell would better serve that purpose because copies of the poem could be readily

copied and passed from hand to hand. I believed that when faced with the possibility of public attention focused on a poem about Bell, her kidnappers would appreciate the consequences stemming from their hurting her in any manner.

64. On the evening of December 17, I had listened to several classical albums my parents owned hoping that I could find one that I could use as inspiration for a poem. I happened upon the song, Clare de Lune, by the composer Claude Debussy. The song immediately caught my attention because certain passages of the song seemed to phonetically express the name, 'Bell'.

65. I had written a rough draft of the poem titled "Tender Bell"(Exhibit 2) on the evening of December 17, but completed the poem when the abductor came by the apartment with Bell on the following evening, Friday, December 18. I wanted the abductor to know the poem had been inspired by a classical song, to reinforce the perception that the poem could also be seen as a lyric.

66. The following day, my dad and I made a trip to Santa Cruz to move more furniture. On Sunday morning, December 20, I received a phone call from my brother in Santa Cruz, who advised that Bell's former owners had called to inform our family that Bell had been returned to them that morning.

67. My dad and I drove down to Santa Cruz for the Christmas weekend on Wednesday evening, December 23. In the early evening on Christmas Eve, my brother answered a phone call from a local doctor who asked to speak with me. The doctor asked me if I had written the poem, 'Bell', about my collie. I confirmed having done so. The doctor proceeded to tell me that the poem had displeased the individuals who had arranged for Bell's visit to South San Francisco, and that Bell had been killed because I didn't write a song. The doctor concluded the conversation by saying, "Have a Merry Christmas", and then hung up.

68. As it was Christmas Eve, I didn't share the doctor's information with anyone else in my family, and tried to treat the doctor's comments as just another typically insensitive joke. The doctor's news did affect my sleep that night, however, and I experienced the nightmare that is described in the short story, "Kashmir", (Attachment 2) on Christmas morning.

69. My mother was awakened by the sound of my getting sick in the bathroom, and came to my assistance. I told my mom about the phone call the night before. My mom also believed that the phone call had been a crank call, and promised to call Bell's new owners later that morning to confirm that Bell was okay.

70. My mom phoned Bell's new owners about 11:00 a.m. on Christmas morning, and when my mom explained why she had called, Bell's new owners offered to bring Bell by our house to spend the day with our family. Later that evening, Bell's new owners called my mom to suggest that letting Bell stay overnight might help me to forget the nightmare I had had the evening before, and they indicated that they would pick Bell up on Saturday evening.

Continued at Para 112.

112. On Monday, May 23, 1960, the principal of my school advised me that I would be meeting with a representative of the Bank of America on Friday, May 27. The principal also disclosed that the bank's representative would supply me with the bank's reasons for recommending that I disavow authorship over 'Tender Bell' and 'Pretty Bell', the short stories, and 'The Bell Symbol'. The principal suggested that I be prepared to evaluate the representative's recommendation seriously.

113. On Friday morning at about 11:00 a.m., the principal led me to an office where I was introduced to the bank's representative, a gentleman about 30 years of age. The principal left the room to leave us alone. The bank's representative began the conversation by honestly ex-

pressing sympathy, on behalf of the bank, for the circumstances that had befallen Bell, which I thanked the representative for. The representative also assured me that bank employees had played no part in the events leading to Bell's death, and I assured the representative that I held doctors, solely, responsible.

114. The representative, in an informal comment, offered that my adversarial relationship with doctors could continue indefinitely if I asserted authorship over my creations about Bell. I told the representative that I was prepared to meet the friction of doctors in forthcoming years. The representative pointed out that if the controversy between myself and doctors persisted, some doctors would continue to insinuate that Bank of America employees had been responsible for Bell's kidnapping and death. The representative advised that this, in turn, would unnecessarily create ill will between bank employees and myself, which was a circumstance that the bank's management wanted to avoid. The representative suggested that I should disavow having authored 'Tender Bell', or anything else about Bell.

115. I advised the bank's representative that the bank's reasons for suggesting that I disavow authorship over the poems, and other works, were justified, and that I appreciated the bank's concern. I also pointed out that I had no assurance that my adversarial relationship with doctors would disappear simply by disavowing authorship over my creations. The representative agreed, and suggested that I give the bank's suggestion a try.

116. My decision to agree to the bank's recommendation was based largely upon my understanding that if I claimed authorship over 'Tender Bell' and 'Pretty Bell', doctors would forever accuse me of having authored 'Trader Bell', also; and then having written the other two poems when doctors caringly suggested that I not blame the Bank of America for kidnapping Bell. By the same token, I recognized that by disavowing authorship over the two poems I did author, 'Trader Bell' alone might circulate. If

the renegade poem circulated within the bank's organization, then an adversarial relationship with the bank might be unavoidable.

117. In the final analysis, I agreed with the representative that disavowal of the poems would in the near term reduce the controversy that doctors had named "The Mongo Affair". I told the representative that I would disavow authorship over the poems, pointing out how I couldn't copywrite them anyway. I advised the representtative that I would honor my commitment to the bank as long as the bank did not interfere in my life. The representative assured me that I was making the proper choice.

118. The representative asked me if he could ask me a personal question, to which I agreed. The representative asserted that I had also acquired a reputation in legal circles, and he asked me what I thought about the bank's insurance. I responded by saying, "I don't think you should rely on the bank's insurance." The bank's representative laughed and told me that he saw no difference in philosophy between the bank and myself, and on that basis he was sure my decision to disavow authorship over the poems was the correct decision. I thanked the representative for his positive assurance, and we concluded the meeting.

Continued at Para 127.

127. In hindsight, my disavowal of my several creations was not a wise choice, but I recognize that I could not have known that at the time. At the age of seven, I wanted to indulge the proposition that forgetting a very ignoble aspect of San Francisco's past was the optimal solution.

128. Unfortunately, there were other aspects of my personal past, notably my view on indeterminate sentences, and Bank of America's angst over the fact that I would not condone the bank's practice of defrauding borrower's

of their equity with VSI moving into the future, that caused the initial negative impressions on both sides to grow with time, reaching the point where the bank's Legal Department conveyed the threat to me in 1971, "to interfere in your business career in every possible way."

129. When my mother passed away in January, 1993, I located at her home in Sacramento a diary that she had maintained while our family lived in Santa Cruz. The diary of daily events identified Bell as having given birth to her litter on September 30, 1959. Knowing that Bell was given away right after her pups were found homes, and recalling the pups birth date helped to trigger my recall in December, 1994, of Bell's kidnapping as occurring two weeks before Christmas. I also recalled having authored 'Tender Bell' and 'Pretty Bell', in 1959 and 1960 ('Only Bell' was created in October, 1962). After recalling 'Pretty Bell', I recalled the creation of doctors in South San Francisco that I had named, 'Trader Bell'.

130. Upon recalling 'Tender Bell', I was able to recall with specificity many facts leading up to my writing the poem, simply by creating a calendar in an Excel spreadsheet, and recalling material facts week by week from the time I met Mongo, up to the meeting with the bank's representative in May, 1960, and then by recalling material facts by working my way back week by week from my meeting with the bank representative to my admission into kindergarten in San Bruno in September, 1957.

Date: January 28, 2000

/s/ Wayne T Ziegler
Wayne T. Ziegler,
Plaintiff and attorney in pro se

APPENDIX F

Tender Bell

I love you, everyway
I really love you, Bell don't go
I need to have you by my side for a while, Bell
I need some time with you to smile, 'fore we try,
Bell

A fog filled winter's day
on the eve of New Year I found her
All the love in this world lie before us Bell
Now it's all changed for who's sake I can't even say
Bell, there's a song in my heart I won't give away

In the springtime Bell, when the birds are singing
in the summer Bell, the apples are with us
in the fall and then, winter snow will melt while I wait
Bell, pretty Bell....

Words, angry words, words that hurt they will never
touch my sweet Bell
Words, angry words, senseless words from those who'd
know her
Love, angry love, how they hate the love I found with Bell
Words, angry words, for the shame in their hearts
they should be made to run
heed the flame of my soul

Bell, tender Bell, love is easier there
trust in our hearts, Bell
Bell, tender Bell, trust the warmth of my touch, pretty....

They're happy, in their homes
They left their memories, on us all

Come back again this time next year,
the pups will be grown....and alive to roam a while
where once only Bell roamed
They lived Bell, every one
and I'll miss you, and the pups, too
Even Sunshine, even Moonlight
'specially River

Hear me?

Hear me.

I love you, Bell

U.S. Copyright 1995
"Tender Bell"
Wayne T. Ziegler
All Rights Reserved

APPENDIX G

September 20, 1990

Office of the United States Trustee
300 N. Los Angeles Street
Los Angeles, California 90012

RE: Wayne T. Ziegler, debtor, LA 8606775 JD

Gentlemen:

I was informed in a telephone conversation with your office today, that the assignment of a trustee to pursue litigation to recover funds of the estate is currently under consideration. In order to provide your office with a clearer understanding of the legal issues, I have taken the liberty of supplying the enclosed brief of the deposit fraud issue against the creditor, Bank of America along with relevant exhibits.

I understand there are two alternatives to recover the funds owed to me: my securing independent counsel to pursue an action in the Bankruptcy Court; or your office's assignment of a trustee to pursue an action.

I would like to express my preference for having the Office of the United States Trustee represent the estate's interests. My preference is based on my experience with how the bank has consistently shown a very low regard for individuals who would uphold basic constitutional values. Consequently, I feel your office could impress upon the Bank of America that it's financial

resources do not make it immune from prosecution for it's socially misguided actions.

I intend to convert my Chapter Seven case to Chapter Thirteen at some point. I am also currently able to pay into the estate on a monthly basis amounts which could defer some legal expenses incurred by your office. I've supplied the enclosed material to help your office ascertain what the preparation of the case for trial would involve. If you need any further information relative to the case, feel free to call me at work, (213) 623-1200. Thank you for your assistance.

Very Truly Yours,

/s/ Wayne T. Ziegler
Wayne T. Ziegler

enclosures

APPENDIX H

April 12, 1991

Office of General Counsel
Legal Department 4017

(213) 228-3104

Wayne T. Ziegler
530 S. Barendo, Apartment #137
Los Angeles, Calfiornia 90020

RE: Wayne T. Ziegler, debtor
First Amended Complaint

Dear Mr. Ziegler:

I have your correspondence dated April 6, 1991 with its enclosure of your First Amended Complaint.

Your letter erroneously states that you agreed to an extension of thirty days on the production of documents and the Bank's answer to the complaint.

I very carefully made clear to you that any extension the Bank was seeking was to respond to the complaint. I never at any time represented that the Bank would be answering your complaint. My understanding of our agreement was set forth in my letter to you dated April 10, 1991, a duplicate copy of which is enclosed for your reference.

The discovery or response to the complaint would be moot in light of the fact that your claim against the

Bank has been compromised by your Chapter 7 trustee, Lorraine Loder. A noticed motion to compromise controversy will be filed with the court shortly.

Very Truly Yours,

/s/ Jaryn Barker
Jaryn Barker
Counsel

JB:ab

Encl.

Cc: Lorraine Loder

APPENDIX I

April 23, 1991

Mr. Jaryn Barker, Esq.
Legal Investigations Department
Bank of America N. T. & S. A.
555 S. Flower Street Eighth Floor
Los Angles, California 90071

RE: Wayne T. Ziegler, debtor
AD91-61032JD

Dear Ms. Barker:

Thank you for your letter of April 19, 1991. I have also received your motion to dismiss and will respond appropriately.

With respect to your request for an extension of time to produce documents, I am agreeable in allowing you an extension of time to produce checks, only. The bank held all original checks for both the Lodi Main and Noe Valley accounts. I can appreciate how some time may be involved in locating these records and will allow the requested extension to the week following the May 21, hearing.

I am not impressed with your department's assurance of good faith in light of the attempt to resolve the issues with the trustee without conferring with me. Your motion to dismiss is akin to the motion for summary judgment filed in the Sacramento action, which was an attempt to

adjudicate the issues before I could produce evidence documenting the issues fully. The Bankruptcy Court already has one cause of action for bad faith denial of a contract.

I expect the loan documents requested and particularly the original signature cards to be made available on May 13, 1991. The logical inference is that your department has destroyed the 154-83308 loan agreement and your failure to provide the documents at the designated time will support the contention I would want to make in opposition to your motion that the signature cards have been destroyed as well.

I have read your motion to dismiss and offer the following comments. I served Ms. Young with the petition to open the case in May, 1990, and have enclosed a copy of the letter supplied with the petition. I was unaware that a proof of service was required by the court. The proof will be filed later this week. Ms. Young obviously received the petition because she referred the production of the Noe Valley statements to Mr. Crone.

With respect to the subpoena to witness, I will supply your office within the next week with amended notices of deposition for Mr. Winslow and the bank. I have enclosed an amended deposition notice for Ms. Patti Minton to be held in Sacramento. I have also supplied interrogatories and admissions. I need to know where the witnesses live in order to make arrangements in those locales to have depositions taken.

The principal issue before the Bankruptcy Court involves your departments' production of checking account statements that do not conform to the statements I received while the Lodi Main and Noe Valley accounts were open. Frankly, I was not impressed that your motion to dismiss sufficiently defended that conduct.

Thank you for your attention to the matters included herein. If you have any questions, feel free to call me at (213) 623-1200.

Very Truly Yours,

/s/Wayne T. Ziegler

Wayne T. Ziegler

enclosures

APPENDIX J

LAW OFFICES OF
LORRAINE L. LODER
811 WEST SEVENTH STREET
ELEVENTH FLOOR
LOS ANGELES, CALIFORNIA 90017
(213) 623-8774

June 10, 1991

Judge James R. Dooley
United States Bankruptcy Court
312 N. Spring Street
Los Angeles, California 90012

RE: In re Wayne Ziegler
U.S.B.C. Case No. LA 86-06775 JD

Dear Judge Dooley:

The debtor in the above referenced matter has advised me that the court had requested information about the position of the trustee in connection with the debtor's action against the Bank of America. Although I acted as the Chapter 7 trustee in the above referenced action, I was discharged as trustee in this matter when a no asset report was filed on or about July 25, 1986. I have spoken with the United States Trustee's office regarding this matter and was advised that I have not been reappointed in connection with this case, and that no chapter 7 trustee has been or will be appointed in this case unless and until monies are collected.

Very Truly Yours,

/s/ Lorraine Loder
Lorraine L. Loder

LLL: sh

cc: Mr. Wayne Ziegler
Jaryn Barker, Esq., Bank of America

APPENDIX K

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

No. LA 86-06775-JD
CHAPTER 7

TRANSCRIPTS OF HEARINGS IN BANKRUPTCY COURT ON MAY 21, 1991 AND JUNE 25, 1991

In re

WAYNE T. ZIEGLER,

MAY 21, 1991

--ooOoo--

The matter of Wayne T. Ziegler, Plaintiff, versus Bank of America N. T. & S. A., and Tom C. Elkins, defendants, Adversarial Case Number AD91-61032JD, came on regularly this day before the Honorable Bankruptcy Judge James R. Dooley, for United States Bankruptcy Court, Central District in Department E.

The Plaintiff, Wayne T. Ziegler, was present and acting In Propria Persona.

The Defendant, Bank of America, was represented by Ms. Jaryn Barker, Attorney at Law.

(This document was transcribed from a tape purchased from the bankruptcy court by Mr. Ziegler in 1991, dated 5/21/91 and numbered 204-91)

The Court: In re: Wayne T. Ziegler, hear in re: motion of Bank of America N. T. & S. A., to dismiss Plaintiff's First Amended Complaint for lack of standing.

Ms. Barker: Good Morning, your Honor, Jaryn Barker for Bank of America.

The Court: Good Morning, Ms. Barker.

Mr. Ziegler: Good Morning, your Honor, Wayne Ziegler, the debtor.

The Court: You're in pro per, Mr.—

Mr. Ziegler: Yes, Your Honor.

The Court: Good Morning, Mr. Ziegler. Just a moment. Just a moment, I just received this file along with--pass it over. Yes, let me hear the argument on this.

Ms. Barker: I'm sorry, your Honor?

The Court: What's that?

Ms. Barker: I'm sorry, I didn't hear you.

The Court: Let me hear the argument. This is your motion, Ms. Barker, so let me hear from you first.

Ms. Barker: Yes it is, Bank of America is moving to have this complaint dismissed because the plaintiff lacks standing, the debtor lacks standing. If--

The Court: Now, the plaintiff has brought suits before on the same set of facts, you say?

Ms. Barker: Yes.

The Court: Yes.

Ms. Barker: Yes, or substantially similar, at least arising out of a boat loan that the bank made to him in about 1981. His bankruptcy, I believe, was filed in 1986. Any cause of action against Bank of

America was never listed in his schedules. After his bankruptcy -- after Mr. Ziegler received his discharge in bankruptcy, he then sued Bank of America three different times. One of those actions is still pending. Notwithstanding that, he's reopened his bankruptcy here in order to list this cause of action against the Bank of America.

The Court: Now he received a discharge, his bankruptcy case was closed, is that –

Ms. Barker: That's -- that's correct.

The Court: Then he sued Bank of America in state court?

Ms. Barker: That's correct. Once in Sacramento, once in San Francisco, and then there's another action in Los Angeles that's still pending.

The Court: Yes, you may continue.

Ms. Barker: Notwithstanding that, he's then reopened his bankruptcy case. Apparently, Lorraine Loder, the Chapter 7 trustee, is not taking any action with it, but she has not formally abandoned the cause of action against the bank. So, unless she has, we would need notice and an opportunity to be heard as a creditor if she was going to abandon it. If she's not going to abandon it, it still remains property of the estate, and she's the proper party in interest to be bringing this.

The Court: Yes.

Ms. Barker: Simply put, I don't believe that Mr. Ziegler does have standing in order to be bringing this cause of action. And even if he did, arguing the other side, the complaint has to be dismissed or should be dismissed cause it fails to state a claim for which relief can be granted.

The Court: Now you say the statute of limitations has run, is that it?

Ms. Barker: I believe the statute of limitations has run, and if you read the complaint and look at the exhibits --and I don't want to get into the merits -- he's alleging that we had a mad conspiracy to kidnap his Collie twenty years ago, and that --

The Court: Kidnapped his Collie?

Ms. Barker: His Collie, like a dog.

The Court: Dog?

Ms. Barker: A Collie. He's alleging that we sank his boat in order to get access to checking account statements that then we – we produced the checking account statements but we made up all of the entries completely. So whatever we've produced in the past, he's saying, is not reflective of the true transactions that he had with the bank. We don't even want to get into the merits. We're just saying before you reach them, he just simply lacks standing, and even if the Court entertained his complaint, the depositions that he's scheduled for the -- for 10:00 o'clock, 10:30 at night, can't go forward, and the discovery --

The Court: 10:30 at night?

Ms. Barker: 10:30 at night, he's --

Mr. Ziegler: Apparently I made a typo, Your Honor, and opposing counsel didn't understand that.

The Court: Yes.

Ms. Barker: 10:30 at night, he's asking for home addresses of the head of the litigation department. That's why I moved for a protective order, your Honor

The Court: Yes.

Ms. Barker: I'm very, very concerned. Since I've had this case, my answer phone at work has

had messages left on it that are nothing but music. It's a very odd situation.

The Court: Yes.

Ms. Barker: For all of those reasons, I don't believe that this person has standing and even if he did this complaint should be dismissed. Thank you.

The Court: Yes, let me hear from you, Mr. Ziegler.

Mr. Ziegler: Your Honor, this is a very involved -- or my relationship with the bank is very involved. It was too involved for me to bring it before the court in 1986 because it would require me to go back and substantiate my relationship with the bank going back to when I was six years old. I filed a complaint -- there was an out-of court settlement in 1982 of a slander suit against the bank with its Legal Department. I spoke with the Legal Department for four months in 1982 resolving that issue. There were certain contractual obligations agreed to. In continuing the banking relationship, the bank, in 1984, employees of the bank, while the bank was insuring the sailboat, sank the sailboat, and changed the loan number to a loan paid in full in 1981 and then used that loan to push me into bankruptcy when there was no loan outstanding.

In addition, the bank embezzled $50,000 from checking accounts and it did, in fact, engage in a conspiracy after you granted the discharge, to steal my original checking account statements documenting that fraud. The legal department has now supplied statements that do not conform at all to the statements that I received while I was maintaining those accounts, which

have 215 duplicate check entries. There's no rational explanation for 215 duplicate check entries. The check publisher numbers all the checks consecutively. Now with respect to the standing, the trustee has specifically allowed me to go forward--

The Court: Do you have any writing to that effect?

Mr. Ziegler: Well I don't have a writing to that effect, but I have conferred with Ms. Loder regarding the bank's claim.

The Court: The Court would require a written statement by the trustee of abandonment or something that would let the Court know that the trustee doesn't go forward --

Mr. Ziegler: Well she's not abandoning the cause of action, because she wants the proceeds of the action to be used, and so do I, for the payment of the estate's creditors.

The Court: Whatever she's doing, she needs to inform the Court in writing.

Mr. Ziegler: Okay, well, then, that needs to be done then. As far as the failure to state a claim, the bank produced fraudulent checking account statements in July of 1988 and thereafter. All of the causes of action regarding deceit are filed within the three year applicable statute of limitation. They are not barred. And the issue before this Court does not involve the sailboat, that's the issue that's before the Los Angeles Superior Court, and that is the issue -- the sailboat is the issue that was raised in the two -- or three state court actions that I had to file primarily because the bank kept filing bad faith motions in those courts that -- that caused them to terminate prematurely.

The Court: Well, what I'll do, I'll take your motion to

dismiss under submission, and I'll grant a motion for a protective order, I'll hold up all discovery and any contact with the bank until the court renders it's decision will be prohibited, by real discovery or otherwise.

Mr. Ziegler: Yeah, if you're getting music on your telephone machine, it's not me.

The Court: Well, I'll issue a protective order, no disturbance until the Court renders it's decision.

Ms. Barker: Also there's -

The Court: No further contact.

Ms. Barker: I'm sorry, there's also another status conference on Mr. Ziegler's complaint that's set for a week from today. I believe that that date still stands.

The Court: That should be taken off calendar.

Ms. Barker: Thank you, Your Honor.

The Court: Yes.

Mr. Ziegler: Your Honor, would you like me to --

The Court: The status conference is calendered for what day?

Mr. Ziegler: The 28th, a week from today.

Ms. Barker: Yes.

The Court: That will be the order of the Court, then.

Mr. Ziegler: Okay, would you like me to have the trustee supply you with the letter concerning my agreement with the -- with her office?

The Court: And serve Ms. Barker, as well.

Mr. Ziegler: Sure.

The Court: Serve the opposing counsel.

Mr. Ziegler: Certainly.

The Court: Whatever the trustee files with the Court should be served on counsel for the Bank of America.

Mr. Ziegler: I understand.

The Court: Yes.

Mr. Ziegler: Okay.
The Court: I'll take the matter under submission.
Ms. Barker: Thank you, your Honor.
Mr. Ziegler: Thank you.
The Court: Thank you, Ms. Barker and Mr. Ziegler.

(The hearing was adjourned until June 25, 1991, which proceedings follow.)

June 25, 1991

--oo0oo--

The matter of Wayne T. Ziegler, plaintiff, versus Bank of America N. T. & S. A., and Tom C. Elkins, defendants, Adversarial Case Number AD91-61032JD, came on regularly this day before the Honorable Bankruptcy Judge James R. Dooley, for United States Bankruptcy Court, Central District in Department E.

The plaintiff, Wayne T. Ziegler, was present and acting in propria persona.

The defendant, Bank of America, was represented by Ms. Catherine Bauer, Attorney at Law.

(This document was transcribed from a tape purchased from the bankruptcy court by Mr. Ziegler in 1991, dated 6/25/91 and numbered 91-260.)

The Court:	In re: Wayne T. Ziegler, Hearing -- motion for a new hearing on contested matter pursuant to Local Rule 117(1)(a), will counsel announce their appearances.
Ms. Bauer:	Good morning, your Honor, Catherine Bauer for Bank of America.
The Court:	Good morning, Ms. Bauer.
Mr. Ziegler:	Good morning, your Honor, Wayne Ziegler, the debtor.
The Court:	Good morning, Mr. Ziegler. Now just a moment, Let me – now, the court has under submission a motion in this case, doesn't it?
Mr. Ziegler:	Yes.
The Court:	There was a motion by the Bank of America to dismiss, is that correct?
Ms. Bauer:	Yes, Your honor. You had that part of the last hearing's request under submission,

you had granted the request for a protective order and we'd like that to stand.

The Court: Yes. Now, what -- does this add something to what the court has under submission? What is this?

Mr. Ziegler: No, it's not intended to add anything. It's intended to have the protective order vacated. Because the bank filed its motion to dismiss solely for the purpose of blocking discovery, and that discovery is material to this court's evaluation of the issues, specifically the production of signature cards that would prove whether or not the checking account statements the bank has supplied are legitimate. I'm saying they're not, and until the bank supplies the signature cards it can't assert that they are. And with the protective order in place, the Court can't know.

The Court: Well, I'm inclined to think that the motion has more merit than you seem to think, but I'm going to take a short recess to look over before -- maybe I can take up the other matters on the 11:00 o'clock calendar first and then I'll take a short recess to....

Mr. Ziegler: Your Honor, can I ask one question?

The Court: Yes.

Mr. Ziegler: Seeing that the motion to dismiss was based on the grounds of standing, have you received the letter from the trustee expressing that she was not planning to go ahead with this?

The Court: Well, I think there was also a statute of limitations question, wasn't there?

Mr. Ziegler: There was a statute of limitations question that has no merit to it.

The Court: Yes, well, that might be -- you may not

think it has merit.

Mr. Ziegler: Well, 348 --

The Court: -- what grounds -- did you withdraw your grounds based upon standing? Let me ask Ms. Bauer.

Ms. Bauer: Based upon standing? Your Honor I'm not sure at this time if we'd be willing to withdraw our objection on those grounds. I'd have to go research it some more. I might add -- you probably recall -- the debtor has a proceeding against the bank in state court, and he –

The Court: Yes, I think this was a case that probably should have – it was in state court already. I'm not too sure why it didn't remain in state court.

Ms. Bauer: He has a case going against the bank in state court, he seems to think there's a conspiracy against him that involves the bank and all the issues should probably stay in state court so that we can litigate them all there. We have to produce documents over and over, and we would prefer to produce them in one place.

The Court: Yes, I mean, this Court -- my basis for ruling on—why can't you continue with your action in state court? I noticed you moved to re-open this case and at the time I granted the reopening, I thought there were some assets coming into this estate,

Mr. Ziegler: The recovery from the state court action --.

The Court: But this is just litigation that you had in state court all along.

Mr. Ziegler: The litigation was outstanding at the time the petition was filed so it's properly estate property, which is why the petition was –

The Court: I'm trying to -- even if I didn't miss it for

statute of limitation, I'm inclined to abstain and allow the state -- you've got state court litigation involved in the same substantive matter, don't you?

Mr. Ziegler: The state court action involves a claim regarding the bank's filing of a fraudulent claim on a sailboat loss. This issue involves embezzlement of money.

The Court: Yes.

Mr. Ziegler: The issue is a core action in this proceeding.

The Court: I know, but you reopened your case after many years, and I think the Court probably should not have granted your motion to reopen. I granted under the idea that there were some assets coming into the estate that needed distribution, but –

Mr. Ziegler: Well, but—

The Court: --all you have coming into the estate is a lot of litigation that –

Mr. Ziegler: Well what's coming into the estate is the cash that's recoverable in both this proceeding and ...

The Court: It might be recoverable.

Mr. Ziegler: All right.

The Court: -- after many years of litigation, is all I see in this estate.

Mr. Ziegler: Well, that's because I haven't been able to conduct any discovery since I initially filed this action.

The Court: You had litigation in the state court all along. If you want to file this -- I'm inclined to abstain from this proceeding, to vacate the order reopening this bankruptcy case, and let the matter -- if you want to pursue these matters pursue them in state court. I don't think they have any place in this bankruptcy case that was closed several

years ago, and I made a mistake in misreading your motion to re-open. I don't think I -- If I had it to do over again, I would not have granted your motion to reopen your bankruptcy case, because all you've brought into this case is litigation that you're handling in pro per --

Mr. Ziegler: Uh-huh.

The Court: --and, it might go on for years and years. And so I think this court should abstain -- but at first I think I was inclined to grant the motion to dismiss, but if I don't dismiss it on that ground, the Court will abstain --

Mr. Ziegler: Well, I don't --

The Court: -- in hearing this matter, if you have any matters to handle, you can handle them in state court.

Mr. Ziegler: Okay, I have no objection to abstaining.

The Court: Yes, the court will abstain from hearing this litigation, and will dismiss or at least I think the District Court may have to sign the order of extension. But I think this court should abstain. And I'll vacate the order reopening the case so that the case will again be closed.

Mr. Ziegler: All right, are you aware that you've got a petition to convert to Chapter 13?

The Court: Well I'll vacate the order -- you see, you come after many years, you reopen your case for one purpose, and now you want to convert to 13.

Mr. Ziegler: Yes, Your honor.

The Court: Vacate the order reopening this case, and let it go back. And if you've got this litigation -- I'll abstain from this litigation, but if you've got any cause of action, you continue with your litigation in the state courts.

Mr. Ziegler: That's fine. You know, in all defense to myself, the reason it took so long to re-open the case was because I got so tied up in state court after the petition was discharged.

The Court: Yes, I see.

Mr. Ziegler: I would have liked to have opened it sooner, I mean I've been in court with the bank three years now and we haven't even gotten to a reading on the merits.

The Court: Yes.

Mr. Ziegler: And that's not because of my conduct.

The Court: Well, in any event, that will be the order of the court, will you prepare an appropriate order?

Mr. Ziegler: Which party?

Ms. Bauer: Would you like me to –

The Court: I think -- at least as far as the adversary, maybe the motion to reopen -- since you didn't have anything to do with that, maybe the court can prepare that after – after I receive your order concerning the adversary proceeding.

Ms. Bauer: All right.

The Court: The court will abstain --

Mr. Ziegler: Okay, that's –

The Court: -- at least --

Ms. Bauer: Thank you, your Honor.

Mr. Ziegler: Thank you.

The Court: Thank you.

CERTIFICATE OF TRANSCRIPTIONIST

I, Linda Way, a transcriptionist specializing in medical and legal transcription, do hereby state that I have faithfully and accurately transcribed the two (2)

audiocassette tapes containing the above-referenced material and that the transcript is complete and accurate as regards the medium of the recordation. No alterations or omissions have been made.

I further certify that I am a disinterested person, having no interest in the matters referenced herein.

/s/ Linda Way
Linda Way

Brandley L. Drew / Owner
TRANSCRIBE
1720 Dryden, #116
Houston, TX 77030
713-785-1723

APPENDIX L

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

No. LA 86-06775-JD
CHAPTER 7

ORDER VACATING ORDER REOPENING BANKRUPTCY CASE

In re

WAYNE T. ZIEGLER,

On August 21, 1990 an order was entered herein reopening debtor's bankruptcy case.

At hearing on June 25, 1991, in Adversary Proceeding No. 91-61032, Wayne T. Ziegler v. Bank of America N.T. & S. A., et al, this court concluded, inter alia:

1. That debtor's purpose in seeking to reopen his bankruptcy case was to institute suit against the Bank of America;
2. That prior to reopening his bankruptcy case, similar litigation was pending in the state courts between the debtor and the Bank of America;
3. That debtor's suit against the Bank of America is of questionable merit, and that there is no reason for the bankruptcy case to remain open while the debtor seeks recovery from the Bank of America;
4. That it would be in the best interests of creditors and of the debtor for the court to vacate the order entered

herein on August 21, 1990 reopening debtor's bankruptcy case and allow the debtor to continue to litigate against the Bank of America in the state courts, if he desires todo so; and

5. That adversary proceeding No. 91-61032 should be dismissed.

NOW, THEREFORE, IT IS ORDERED that the order entered herein on August 21, 1990 reopening debtor's bankruptcy case be, and it is hereby vacated.

A separate order will be filed dismissing adversary proceeding 91-61032.

Dated: January 30, 1992

/s/James R. Dooley
JAMES R. DOOLEY
Bankruptcy Judge

APPENDIX M

DEBBIE L. YOUNG
JOHN C. FAUVRE
ULLAR VITSUT
OFFICE OF THE GENERAL COUNSEL
BANK OF AMERICA N.T. & S.A.
MICHAEL J. HALLOAN, GENERAL COUNSEL
Bank of America Tower
555 South Flower Street, Suite 800
Los Angeles, California 90071-2398
(213 228-2464

Attorneys for the Defendants
Bank of America N.T.& S.A. and
Winslow Christian, erroneously named as
Christian Winslow

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Case No BC 033836

WRITTEN RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS

WAYNE T. ZIEGLER,
Plaintiff,

vs.

BANK OF AMERICA, N.T. & S.A., GEORGE COOMBES, JR., CHRISTIAN WINSLOW, TOM C. ELKINS, JOHN KEY, PAMELA KEY
Defendants

PROPOUNDING PARTY: Plaintiff, Wayne T. Ziegler

RESPONDING PARTY: Defendant, Bank of America N.T. & S.A.("Bank of America")

SET NO: One

Bank of America hereby responds to Plaintiff's Request for Production of Documents served on October 7, 1991 as follows:

REQUEST NO. A:

Document:	The signature card to plaintiff's Lodi Main checking account #0107-03354.
Time:	November 11, 1991 at 10:00 a.m.
Place:	Your offices at 555 S. Flower Street, 8th Floor
For:	Inspection

RESPONSE TO REQUEST NO. A:

Bank of America objects that this request seeks documents already requested and/or seeks original documents which may be unavailable. This request was propounded solely for harassment and to create burden and expense for Bank of America. Bank of America further objects that the date specified by plaintiff for production, November 11, 1991, is a legal holiday. Bank of America will await the ruling on its Motion for a Determination that

Plaintiff is a Vexatious Litigant and Required to Post Security.

REQUEST NO. B:

Document:	The signature card to plaintiff's Noe Valley checking account #0255-09736.
Time:	November 11, 1991 at 10:00 a.m.
Place:	Your offices at 555 S. Flower Street, 8th Floor
For:	Inspection

RESPONSE TO REQUEST NO. B:

Bank of America objects that this request seeks documents already requested and/or seeks original documents which may be unavailable. This request was propounded solely for harassment and to create burden and expense for Bank of America. Bank of America further objects that the date specified by plaintiff for production, November 11, 1991, is a legal holiday. Bank of America will await the ruling on its Motion for a Determination that Plaintiff is a Vexatious Litigant and Required to Post Security.

REQUEST NO. C:

Document:	The signature card to plaintiff's Downey-Paramount checking account #0564-03919.
Time:	November 11, 1991 at 10:00 a.m.
Place:	Your offices at 555 S. Flower Street, 8th Floor
For:	Inspection

RESPONSE TO REQUEST NO. C:

Bank of America objects that this request seeks documents already requested and/or seeks original documents

which may be unavailable. This request was propounded solely for harassment and to create burden and expense for Bank of America. Bank of America further objects that the date specified by plaintiff for production, November 11, 1991, is a legal holiday. Bank of America will await the ruling on its Motion for a Determination that Plaintiff is a Vexatious Litigant and Required to Post Security.

REQUEST NO. D:

Document:	The signature card to plaintiff's Arden Way checking account (branch is located in Sacramento and was opened between January and June, 1981, and closed June 2, 1982).
Time:	November 11, 1991 at 10:00 a.m.
Place:	Your offices at 555 S. Flower Street, 8th Floor
For:	Inspection

RESPONSE TO REQUEST NO. D:

Bank of America objects that this request seeks documents already requested and/or seeks original documents which may be unavailable. This request was propounded solely for harassment and to create burden and expense for Bank of America. Bank of America further objects that the date specified by plaintiff for production, November 11, 1991, is a legal holiday. Bank of America will await the ruling on its Motion for a Determination that Plaintiff is a Vexatious Litigant and Required to Post Security.

REQUEST NO. D:

Document:	The signature card to plaintiff's Arden Way checking account (branch is located in

	Sacramento and was opened between January and June, 1981, and closed June 2, 1982).
Time:	November 11, 1991 at 10:00 a.m.
Place:	Your offices at 555 S. Flower Street, 8th Floor
For:	Inspection

RESPONSE TO REQUEST NO. D:

Bank of America objects that this request seeks documents already requested and/or seeks original documents which may be unavailable. This request was propounded solely for harassment and to create burden and expense for Bank of America. Bank of America further objects that the date specified by plaintiff for production, November 11, 1991, is a legal holiday. Bank of America will await the ruling on its Motion for a Determination that Plaintiff is a Vexatious Litigant and Required to Post Security.

REQUEST NO. E:

Document:	Checking account statements for the plaintiff's Downey-Paramount checking account #0564-03919.
Time:	November 11, 1991 at 10:00 a.m.
Place:	Your offices at 555 S. Flower Street, 8th Floor
For:	Inspection

RESPONSE TO REQUEST NO. E:

Bank of America objects that this request seeks documents already provided. This request was propounded solely for harassment and to create burden and expense for Bank of America. Bank of America further objects that the date specified by plaintiff for production, Novem-

ber 11, 1991, is a legal holiday. Bank of America will not make any production. If the Motion for Determination that Plaintiff is a Vexatious Litigant is denied, Bank of America will advise plaintiff of the cost of procuring such documents and plaintiff can reconsider whether he wishes to absorb the cost.

REQUEST NO. F:

Document:	Copies of all checks for the plaintiff's Lodi Main checking account #0107-03354.
Time:	November 11, 1991 at 10:00 a.m.
Place:	Your offices at 555 S. Flower Street, 8th Floor
For:	Inspection

RESPONSE TO REQUEST NO. F:

Bank of America objects that this request seeks documents already provided. This request is burdensome, oppressive and would entail countless hours of research. Since these documents were already given to plaintiff, it is unreasonable for plaintiff to seek them again. Bank of America further objects that the date specified by plaintiff for production, November 11, 1991, is a legal holiday. Bank of America will not make any production. If the Motion for Determination that Plaintiff is a Vexatious Litigant is denied, Bank of America will advise plaintiff of the cost of procuring such documents and plaintiff can reconsider whether he wishes to absorb the cost.

REQUEST NO. G:

Document:	Copies of all checks for the plaintiff's Noe Valley checking account #0255-09736.
Time:	November 11, 1991 at 10:00 a.m.
Place:	Your offices at 555 S. Flower Street, 8th Floor

For: Inspection

RESPONSE TO REQUEST NO. G:

Bank of America objects that this request seeks documents already provided. This request is burdensome, oppressive and would entail countless hours of research. Since these documents were already given to plaintiff, it is unreasonable for plaintiff to seek them again. Bank of America further objects that the date specified by plaintiff for production, November 11, 1991, is a legal holiday. Bank of America will not make any production. If the Motion for Determination that Plaintiff is a Vexatious Litigant is denied, Bank of America will advise plaintiff of the cost of procuring such documents and plaintiff can reconsider whether he wishes to absorb the cost.

REQUEST NO. H:

Document:	Copies of all checks for the plaintiff's Downey-Paramount checking account #0564-09736. (If original checks are unavailable, microfiche copies are acceptable).
Time:	November 11, 1991 at 10:00 a.m.
Place:	Your offices at 555 S. Flower Street, 8th Floor
For:	Inspection

RESPONSE TO REQUEST NO. H:

Bank of America objects that this request seeks documents already provided. This request is burdensome, oppressive and would entail countless hours of research. Since these documents were already given to plaintiff, it is unreasonable for plaintiff to seek them again. Bank of

America further objects that the date specified by plaintiff for production, November 11, 1991, is a legal holiday. Bank of America will not make any production. If the Motion for Determination that Plaintiff is a Vexatious Litigant is denied, Bank of America will advise plaintiff of the cost of procuring such documents and plaintiff can reconsider whether he wishes to absorb the cost.

REQUEST NO. I:

Document:	Copies of all checks for the plaintiff's Arden-Way checking account. (If original checks are unavailable, microfiche copies are acceptable).
Time:	November 11, 1991 at 10:00 a.m.
Place:	Your offices at 555 S. Flower Street, 8th Floor
For:	Inspection

RESPONSE TO REQUEST NO. I:

Bank of America objects that this request seeks documents already provided. This request is burdensome, oppressive and would entail countless hours of research. Since these documents were already given to plaintiff, it is unreasonable for plaintiff to seek them again. Bank of America further objects that the date specified by plaintiff for production, November 11, 1991, is a legal holiday. Bank of America will not make any production. If the Motion for Determination that Plaintiff is a Vexatious Litigant is denied, Bank of America will advise plaintiff of the cost of procuring such documents and plaintiff can reconsider whether he wishes to absorb the cost.

Dated: November 1, 1991

DEBBIE L. YOUNG
JOHN C. FAUVRE
ULLAR VITSUT
OFFICE OF THE GENERAL

COUNSEL
BANK OF AMERICA N.T. &
S.A.
MICHAEL J. HALLORAN,
GENERAL COUNSEL

By: /s/ Debbie L. Young
Debbie L. Young
Attorneys for Defendant
Bank of America N.T. & S.A.
Winslow Christian

APPENDIX N

DEBBIE L. YOUNG
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(213 228-2464

Attorneys for the Defendants
Bank of America N.T.& S.A. and
Winslow Christian, erroneously named as
Christian Winslow

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Case No BC 033836

NOTICE OF MOTION AND MOTION FOR DETERMINATION THAT PLAINTIFF IS A VEXATIOUS LITIGANT AND REQUIRED TO POST SECURITY; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF DEBBIE L. YOUNG, JARYN BARKER, AND CATHERINE BAUER.
[C.C.P.§ 391.1 et seq.]

WAYNE T. ZIEGLER,
Plaintiff,

vs.

BANK OF AMERICA, N.T. & S.A., GEORGE COOMBES, JR., CHRISTIAN WINSLOW, TOM C. ELKINS, JOHN KEY, AND PAM KEY
Defendants

Date: January 10, 1992
Time: 8:30 a.m.
Dept: 82
Motion and Discovery
Cut-off Dates: None
Trial Date: None

TO: WAYNE T. ZIEGLER, PLAINTIFF, IN PRO PER:

PLEASE TAKE NOTICE that on January 10, 1992, in Department 82 at 8:30 a.m., or as soon thereafter as counsel may be heard in the above noted court, located at 111 North Hill Street, Los Angeles, California, defendant Bank of America N.T. & S.A. and Winslow Christian, erroneously named as Christian Winslow, (collectively, "Bank of America") hereby move the court for an order determining plaintiff Wayne T. Ziegler ("plaintiff" or "Ziegler") to be a vexatious litigant required to post security of no less than $50,000, pursuant to C.C.P. § 391 et seq.

This motion is based upon this Notice, the attached Memorandum and Points and Authorities, and Declarations of Debbie L. Young, Jaryn Barker, and Catherine Bauer, the Request for Judicial Notice lodged on October 18, 1991, and upon such other evidence as the court may entertain at hearing on this Motion.

Dated: December 18, 1991

DEBBIE L. YOUNG
JOHN C. FAUVRE
ULLAR VITSUT
OFFICE OF THE GENERAL
COUNSEL
BANK OF AMERICA N.T. & S.A.
MICHAEL J. HALLORAN.,
GENERAL COUNSEL

By: /s/ DEBBIE L. YOUNG
Debbie L. Young
Attorneys for Defendant
Bank of America N.T. & S.A.
Winslow Christian

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Ziegler has sued Bank of America five times. Ziegler lost three of those actions. Two actions are presently pending, both in Los Angeles Superior Court. Bank of America directs the court to the Request for Judicial Notice, filed on October 18, 1991.

A. Underlying facts

A review of the complaints attached to the Request for Judicial Notice ("RFJN") reveal that Ziegler has told nearly the same story in every complaint. In this and other complaints, Ziegler sets forth the following facts:

Para In this Complaint	Para. In First Los Angeles Action Complaint	Date	Event
9	30	Summer, 1959	Ziegler meets Mongo in a mental institution
8, 13	*	Before 5/60	Collie named Bell kidnapped
8	30	Before 5/60	Ziegler writes poem titled, "Bell"
8	*	5/60	Bank of America allegedly requests Ziegler to disavow authorship of poem.
20	*	Ziegler's teen years	Bank allegedly covers up collie's abduction by accusing Ziegler of inventing the expression, "I wouldn't suck the bank's dick, I'd sue
29	17	6/25/81	Ziegler receives a boat loan from Bank of America.
35	24	11/81	Ziegler asks Bank of America to procure Insurance on the boat.
35	25-27	12/10/81	The boat is

			vandalized, allegedly by Bank of America.
40	30	3/30/82	Bank allegedly agrees orally to pay for vandalism
40	135	3/82 to 6/84	Bank allegedly improperly deducts money from Ziegler's checking account.
*	43	6/3/82	Ziegler signs automatic debit agreement to deduct loan payments from his checking account.
*	59	10/5/84	Ziegler complains to Bank that he is not receiving credit on the boat loan for loan payments deducted from his checking account.
43	63	11/26/84 to 1/85	Ziegler discusses errors in accounting for boat loan.
42	73	12/18/84	Boat sinks.
44	106	8/27/85	Bank learns that the insurance proceeds

		are less than the loan balance and Bank expects payment on the boat loan.

Based on the foregoing, Ziegler sued Bank of America five times:

RFJN # 1	3/23/88	Ziegler files action in Sacramento ("Sacramento Action").
RFJN # 4	8/17/88	Ziegler files action in San Francisco("San Francisco Action")
RFJN # 6	9/7/89	Ziegler files first action in Los Angeles ("First Los Angeles Action")
RFJN # 9	8/21/90	Ziegler sues Bank of America in an adversary action in Bankruptcy Court, Central District of California, Los Angeles ("Bankruptcy Action")
RFJN # 11	7/29/91	Ziegler sues Bank of America in Los Angeles, with a new case number (Second Los Angeles Action).

B. Summary of Five Lawsuits

The Sacramento Action was resolved in favor of Bank of America on a motion for summary judgment, based upon the statute of limitations. RFJN #2 and 3. The San Francisco Action was dismissed when a demurrer was sustained without leave to amend. RFJN #5. The First Los Angeles Action similarly was dismissed after the court granted Bank of America's demurrer.
RFJN #7. In the First Los Angeles Action, Ziegler appealed, and the appellate court reversed, returning the action to the trial court. RFJN #8. While the appeal was pending, Ziegler filed the Bankruptcy Action, which issued a protective order against any contact by Ziegler to Bank of America, including discovery, and granted from the bench a motion to dismiss. The protective order was required because, inter alia, Ziegler propounded obscene discovery (i.e. – requests for admission regarding the phrase, "I WOULDN'T SUCK THE BANK'S DICK, I'D SUE", and noticed depositions for 10 o'clock at night. Barker Declaration, para. 3

This most recent lawsuit in Los Angeles ("Second Los Angeles Action") contains the same allegations that have appeared in the preceding lawsuits. An analysis of the recurring themes and where (by paragraph number) they appear in each of the complaints is attached hereto as Exhibit 1.

II.
LEGAL ANALYSIS

Code of Civil Procedure § 391.1 was recently amended to enlarge the vexatious litigant statute. After thte 1990 revisions, C.C.P. § 391(b) defines a "vexatious litigant" as one who does any one of the following:

1. In the immediately preceding seven year period, has commenced, prosecuted, or maintained in propria persona

at least five litigations other than in small claims court which have been (i) finally determined adversely to the person, or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing;

2. After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined, or (ii) the cause of action, claimed controversy or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined;

3. In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engaged in other tactics that are frivolous or solely intended to cause unnecessary delay;

4. Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transactions, or occurrence.

While every single one of the foregoing subparagraphs defining a vexatious litigant may apply to Ziegler, Ziegler indisputably qualifies under no less than two of the foregoing provisions.

C.C.P. § 391(2) precludes a person from relitigating the same causes of action, claims, controversies or any of the issues of fact or law previously concluded against the same defendant. In the Sacramento Action, Bank of America received a summary judgment that Zigeler's claims were barred by the statute of limitations. See Sacramento Action, RFJN #2 and 3. In the San Francisco Action, the court sustained a demurrer without leave to amend. RFJN #5. Since the issues raised in the Second Los Angeles have been finally determined against Ziegler, subsection 2 qualifies Ziegler as a vexatious litigant.

Second, C.C.P. § 391(3) provides that frivolous tactics qualify a party as a vexatious litigant. Examples of Ziegler's frivolous tactics are endless:

(a) Ziegler propounded discovery requesting Bank of America to admit that it discussed with him a phrase, "I WOULDN'T SUCK THE BANK'S DICK, I'D SUE;"

(b) Ziegler has asked for the same documents over and over and over again, disputing that the Bank has produced authentic documents after it has complied with the request;

(c) The pleading and papers which Ziegler has filed with this and other courts show that he became obsessed with the death of his collie, Bell, while he was a child;

(d) Ziegler's court documents reflect his paranoid belief that the Bank is persecuting him because he took pity on a person that he met in a mental hospital, Mongo, whose car had been allegedly repossessed by Bank of America for failure to procure car insurance;

(e) Ziegler also takes credit for

(i) coining the phrase, "Give Me a Break;"

(ii) the indeterminate sentencing system now used in California;

(iii) authorizing a poem about his collie which created a sensation 20 years ago.

Young Declaration, para. 7; see also Exhibit 1 attached hereto.

Because of similar shenanigans in the Bankruptcy Action, the Honorable Judge Dooley issued a Protective Order, precluding Ziegler from contacting Bank of America or conducting additional discovery. RFJN #10a.

Third, C.C.P. § 391 (b) (1) requires five litigations finally determined against the plaintiff. Bank of America has been a defendant in five actions brought by Ziegler. Three of those actions were finally determined against Ziegler. The Sacramento Action terminated by summary judgment. The San Francisco Action ended with an unopposed demurrer sustained without leave to amend. In the Bankruptcy Action, the court granted a motion to

dismiss from the bench and issued a blanket protective order, preventing Ziegler form contacting Bank of America. Bauer Declaration; RFJN #10 and 10a. One action, the first Los Angeles Action, is still pending. The present case constitutes the fifth litigation. These five actions certainly qualify Ziegler as a vexatious litigant in the spirit, (if not the letter) of subsection 1.

In First Western Devleopment v. Superior Court, 212 Cal.App.3d 860, 261 Cal.Rptr. 116 (1989), the court issued a peremptory writ, reversing a trial court's truling that it was "premature" to ascertain whether the plaintiff was a vexatious litigant. The court took judicial notice of the three lawsuits in which the plaintiff Andrisani attempted to relitigate issues which had been finally determined in an unlawful detainer action. The court noted the cost of vexatious litigants to the court system:

The unreasonable burden placed upon the courts by groundless litigation prevents a speedy consideration of proper litigation and the tremendous time and effort consumed by unjustifiable suits makes it imperative that the courts enforce the vexatious litigant statutes enacted by the legislature. "[T]he trial courts should be alert to an abuse of our judicial system and should take firm action." [citations omitted] . . . It is axiomatic in our system of justice that every person is entitled to his day in court; however a litigant is not entitled to two days in court.Emphasis added; Id. At 870. Like plaintiff Andrisani in the First Western Development v. Superior Court case, Ziegler "is no burdening the court system with trifling and frivolous litigation mererly for his own entertainment." Id. At 869. He is not entitled to FIVE bites at the apple, and "firm action" is warranted.

III.
CONCLUSION

In light of the foregoing, Bank of America and Winslow Christian respectfully request the court to declare Ziegler

a vexatious litigant and require him to post a bond of $50,000 before proceeding in this action.

Dated: December 18, 1991

DEBBIE L. YOUNG
JOHN C. FAUVRE
ULLAR VITSUT
OFFICE OF THE GENERAL COUNSEL
BANK OF AMERICA N.T. & S.A.
MICHAEL J. HALLORAN.,
GENERAL COUNSEL

By: /s/ DEBBIE L. YOUNG
Debbie L. Young
Attorneys for Defendant
Bank of America N.T. & S.A.
Winslow Christian

APPENDIX O

DEBBIE L. YOUNG
JOHN C. FAUVRE
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(213 228-2464

Attorneys for the Defendants
Bank of America N.T.& S.A. and

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Case No C 736732

NOTICE OF MOTION AND MOTION FOR DETERMINATION THAT PLAINTIFF IS A VEXATIOUS LITIGANT AND REQUIRED TO POST SECURITY; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF DEBBIE L. YOUNG AND, JARYN BARKER.
[C.C.P.§ 391.1 et seq.]

WAYNE T. ZIEGLER,
Plaintiff,

vs.

BANK OF AMERICA, N.T. & S.A., Defendant

Date: April 28, 1992
Time: 8:30 a.m.
Dept: 82
Motion And Discovery
Cutoff Dates: None
Trial Cate: None

TO: WAYNE T. ZIEGLER, PLAINTIFF, IN PRO PER:

PLEASE TAKE NOTICE that on April 28, 1992, in Department 82 at 8:30 a.m., or as soon thereafter as counsel may be heard in the above noted court, located at 111 North Hill Street, Los Angeles, California, defendant Bank of America N.T. & S.A. hereby moves the court for an order determining plaintiff Wayne T. Ziegler ("plaintiff" or "Ziegler") to be a vexatious litigant required to post security of no less than $50,000, pursuant to C.C.P. § 391 et seq.

This motion is based upon this Notice, the attached Memorandum and Points and Authorities, and Declarations of Debbie L. Young and, Jaryn Barker, the Request for Judicial Notice lodged concurrently herewith, and upon such other evidence as the court may entertain at the hearing on this Motion.

Dated: Arpil 7, 1992

DEBBIE L. YOUNG
JOHN C. FAUVRE
ULLAR VITSUT
OFFICE OF THE GENERAL COUNSEL
BANK OF AMERICA N.T. & S.A.
MICHAEL J. HALLORAN.,
GENERAL COUNSEL

By: /s/ DEBBIE L. YOUNG
Debbie L. Young
Attorneys for Defendant
Bank of America N.T. & S.A.

MEMORANDUM OF POINTS AND AUTHORITIES

B. No Probable Likelihood of Success on the Merits

In the present action, Ziegler admits that he lost his boat on December 18, 1984, and knew by October 5, 1984 that Bank of America was deducting money, allegedly improperly, from his checking account. He cannot no contend that the limitations periods have not run.

Plaintiff suffered harm in 1982 and 1984, when he lost his boat and funds were allegedly removed from his checking account. (Present amended complaint, paragraphs 59, 63, 135, RFJN #7). Ziegler knew about the allegedly improper removal of funds from his checking account no later than October 5, 1984, because he complained to Bank of America about the deductions from his checking account(Present amended complaint, paragraphs 59, RFJN #7). The limitations period began to run no later than the removal of the money and Ziegler's discovery of the alleged theft in 1984.

III.

CONCLUSION

In light of the foregoing, Bank of America respectfully requests the court to declare Ziegler a vexatious litigant and require him to post a bond of $50,000 before proceeding in this action.

Dated: April 3, 1992

DEBBIE L. YOUNG
JOHN C. FAUVRE

ULLAR VITSUT
OFFICE OF THE GENERAL COUNSEL
BANK OF AMERICA N.T. & S.A.
MICHAEL J. HALLORAN,
GENERAL COUNSEL

By: /s/ Debbie L. Young
Debbie L. Young
Attorneys for Defendant
Bank of America N.T. & S.A.

APPENDIX P

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

BC 033836

WAYNE T. ZIEGLER,

v.

BANK OF AMERICA N. T. & S. A.,

HONORABLE CHARLES C. LEE

Counsel for Plaintiff: in pro per

Counsel for Defendant: B. of A. General Counsel
By: Debbie L. Young

NATURE OF PROCEEDINGS.

Demurrer of defendants Bank of America N. T. & S.A. and Winslow Christian to civil complaint for damages for conspiracy and deceit.

Motion of defendants, above, for determination that plaintiff is a vexatious litigant and required to post security [CCP §391 et. Seq.]

Motion granted on grounds set forth in moving papers per CCP § 391(c), plaintiff Ziegler is declared a vexatious litigant and must post a bond of $25,000.00 with the Los Angeles Superior Court, within 10 days, before proceeding in this action.

Court takes the demurrer off calendar.

January 10, 1992
Clerk

Notice: X
By Moving Party: X

Note: Prepared from Court form document not reproducible in booklet format, contains text that Clerk typed on the court's form document

DEBBIE L. YOUNG
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Attorneys for the Defendants
Bank of America N.T.& S.A. and
Winslow Christian, erroneously named as
Christian Winslow

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Case No BC 033836

WAYNE T. ZIEGLER,
Plaintiff,

vs.

BANK OF AMERICA, N.T. & S.A., GEORGE COOMBES, JR., CHRISTIAN WINSLOW, TOM C. ELKINS, JOHN KEY, AND PAM KEY
Defendants

ORDER DISMISSING COMPLAINT

The Motion for Order Dismissing Action for Failure to Post Security ("Motion") of Bank of America N.T. & S. A.

and Winslow Christian came on regularly for hearing on April 15, 1992, in Department 84 of the above-entitled court, the Honorable Judge Charles Lee, presiding. Having granted the Motion pursuant to Code of Civil Procedure §391.4, and good cause appearing therefor,

IT IS HEREBY ORDERED that the Complaint of Plaintiff Wayne T. Ziegler is dismissed as to Bank of America N.T. & S.A. and Winslow Christian.

Dated: June 30, 1982

Charles C. Lee, Judge
The Honorable Charles Lee
Judge of the Superior Court

APPENDIX Q

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

WAYNE T. ZIEGLER,
Plaintiff and Appellant

v.

BANK OF AMERICA, N.T. & S.A.
Defendant and Respondent

B048869
(Super.Ct.No. C736722

Appeal from an order of the Superior Court of Los Angeles County. William Huss, Judge. Reversed.

Wayne T. Ziegler, in pro per, for Plaintiff and Appellant.

Michale C. Halloran, Debbie L. Young, John C. Fauvre, Ullar Vitsut, Winslow Christian for Defendant and Respondent

Plaintiff appeals from an order of dismissal granted to defendant after the court sustained defendant's demurrer without leave to amend. The demurrer was made on grounds that under the doctrine of res judicata, prior determinations in actions between plaintiff and

defendant operated as a bar to all of the causes of action in the instant case. We find no such bar and therefore the order of dismissal must be reversed and the cause remanded to the trial court for further proceedings.

PROCEDURAL AND FACTUAL BACKGROUND

1. The Prior Action

On March 23, 1988, in the County of Sacramento, plaintiff filed a complaint against defendant for negligence. It alleges that in June 1981, plaintiff took out a loan with defendant to purchase a boat and used the boat as security for defendant. It further alleges that initially, plaintiff procured his own insurance for the boat but it lapsed in September 1984 and defendant then secured insurance for it when plaintiff was unable to afford to obtain new insurance himself; that this new insurance covered only defendant's interest in the boat and not plaintiff's equity in it; that in December 1984, the boat sank during a storm while moored to a dock; that plaintiff received an estimate of $2,000 just to raise the boat; that the insurance which defendant had obtained for the boat required defendant to repossess the boat before the insurer would pay for the loss, even though plaintiff was current on his loan payments; that neither defendant nor the insurer ever mailed plaintiff a copy of the policy and therefore plaintiff was unaware of this provision; that the insurance which defendant procured was inferior to that which plaintiff had obtained initially; that this provision for repossession subjected plaintiff to "discreditable credit reporting" and the entire loss of his interest in the boat; that defendant continued to pursue plaintiff for the unpaid balance which remained on the boat after the boat had been repossessed; that plaintiff had to file bankruptcy to get protection from defendant; and that all of these things caused plaintiff such emotional turmoil that his job performance suffered and

his employer indicated to him that he should seek employment elsewhere and so plaintiff quit his job.

In his "demand for relief," plaintiff sought monetary damages "based upon the negligence of the defendant in adequately [sic] informing [him] of the nature of the insurance coverage that the defendant had ordered for the protection of [his] property" and on defendant's alleged negligence in ordering insurance "which was inferior to the insurance the plaintiff had ordered." Plaintiff sought damages for the emotional distress he experienced by way of (1) the repossession, (2) the pursuit of payments by defendant after the repossession, and (3) the resultant need for him to file bankruptcy. He also sought damages for the repossession of his boat.

The defendant obtained a summary judgment in its favor on January 9, 1989. The order for summary judgment states that defendant had shown that the complaint was barred by the statute of limitations.

Additionally, in between the time plaintiff had filed that Sacramento complaint and defendant had obtained a summary judgment on it, plaintiff had also filed another complaint against defendant, (this time in San Francisco), and defendant had filed a demurrer which was sustained without leave to amend. This San Francisco complaint was filed August 17, 1988, and the demurrer was sustained without leave three months later, on November 16, 1988. There is no indication in the record of the grounds for the demurrer to that San Francisco action, although plaintiff states in his opening brief that defendant demurred on the grounds that there was another action pending between the parties on the same cause of action (i.e., the Sacramento action). The record reflects that plaintiff did not file opposition papers and did not request oral argument. According to defendant's brief on appeal, plaintiff did not appeal the disposition of either the Sacramento or the San Francisco actions.

2. The Instant Action

On September 7, 1989, plaintiff sued defendant again, this time in Los Angeles County. A first amended complaint was subsequently filed in early 1990. It is this Los Angeles action that is the subject of the instant appeal.

In February, 1990 defendant demurred to the first amended complaint, contending that it and every cause of action in it "fails to state a cause of action, since each and every claim contained therein is barred by the doctrines of res judicata and/or collateral estoppel." Plaintiff filed opposition to the demurrer, defendant filed reply papers, and a hearing was held on March 2, 1990. The demurrer was sustained without leave to amend. The minute order states: "The Court finds that the issues have been litigated twice and should not be relitigated."

Thereafter, plaintiff filed this appeal. Upon examining the record on appeal, we observed that it contained no order of dismissal. Defendant's attorney was directed to obtain same so that this court would have jurisdiction to hear the appeal. An order of dismissal was thereafter filed with this court.

DISCUSSION

1. The Issue of Res Judicata

a. The Rule

"A final judgment on the merits between parties who in law are the same operates as a bar to a subsequent action upon the same cause of action, settling not only every issue that was raised, but also every issue that might have been raised in the first action. [Citations.]" (Olwell v. Hopkins (1946) 28 Cal.2d 147, 152, emphasis always

added)[1]. TThus, to be a complete bar in a subsequent suit, the prior judgment must meet two requirements: it must resolve the same cause of action and it must have been granted on the merits of the prior action.

b. Plaintiff's First Cause of Action

Plaintiff's first cause of action in the instant case is labeled "Deposit Fraud." In it, plaintiff alleges that he had a checking account in defendant's "Stockton Main" branch between March 1982 and June 1984 and the purpose of that account was to make payments to the IRS.

Plaintiff further alleges (1) that per the agreement he had with defendant with respect to that account, defendant would automatically pay plaintiff's installment payments to the IRS, using funds from that account; (2) that defendant converted funds from that account to its own purposes; (3) that those funds total $3,000; (4) that defendant refused to provide "verification of amounts transferred to the Internal Revenue Service under the plaintiff's auto-debit agreement"; (4) that defendant closed that account; and (5) that contrary to representations made to plaintiff by defendant's representatives when he opened that account, defendant transfers funds between accounts held by a single customer.

This cause of action is different from the one which plaintiff alleged in his Sacramento suit, which was negligence by the defendant in its procurement of insurance for the boat. Therefore, the prior judgment does not bar this cause of action.

---

[1] When the cause of action in the second suit is not the same as the cause of action upon which the prior judgment was rendered, that prior judgment will be conclusive only with respect to those issues which were actually raised and determined in the former action. (Olwell v. Hopkins, supra, 28 Cal.2d at p. 151.)

c. The Other Causes of Action

Under Koch v. Rodlin Enterprises (1990) 223 Cal.App.3d 1591, the summary judgment obtained in the Sacramento case will not have a res judicata effect to preclude plaintiff's other causes of action in his amended complaint because that summary judgment was obtained on a procedural determination rather than a substantive one. (Id. at p. 1595, et seq.) It was not a judgment on the merits of plaintiff's claim. Rather, the Sacramento court only determined that whatever those merits, plaintiff took too long to bring his cause of action for negligence. The Koch court recognized that in such a case, a plaintiff may be able, by means of a different pleading, to eliminate the defects in the prior pleading and/or correct the omissions, and thereby state a cause of action that will not fall to procedural or technical challenges.[2]

Thus, plaintiff's second cause of action which appears to be one for breach of the contract on the sailboat loan has survived defendant's "res judicata" demurrer in this action, as have plaintiff's third cause of action (which he tells us in his opening brief is one for conversion of the

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[2] Koch involved two lawsuits. The first Koch action, was one for rescission of a contract for purchase of land, the plaintiffs alleging in that suit that defendants had violated California's Subdivision Map Act. A summary judgment was granted to the defendants on statute of limitations grounds. In the second Koch action, the cause of action was also for rescission of the contract, but this time it was based on common law fraud, with plaintiffs alleging that they had just recently discovered the fraud and therefore tbere was no statute of limitations problem. The defendants demurred on the grounds that the new action was barred by the doctrine of res judicata because the first Koch suit was a complete bar to further litigation. The trial court agreed and sustained the demurrer. The reviewing court reversed, finding that the prior action was not disposed of on its merits.

sailboat) and plaintiff's fourth cause of action which appears to be one for fraud in connection with defendant's processing of the insurance claim for the sinking of the sailboat. This does not mean that there might not be other grounds for demurrers or motions for summary judgment related to any or all of the causes of action in the first amended complaint. We do not, however, intend by anything we say in this opinion to imply that there are or are not such grounds.

2. The Issue of the Statute of Limitations

On appeal defendant contends that it was proper for the trial court to sustain the demurrer without leave to amend because all of the claims asserted by plaintiff in his first amended complaint are barred by the statute of limitations. The problem with this assertion is that the statute of limitations was not asserted by defendant in the trial court. Although defendant, in effect, invites us to examine the 134 pages of allegations in the amended complaint and see for ourselves that all of plaintiff's claims are time barred, we decline to do so. Any assertion of a statute of limitations to those four causes of action would require giving the plaintiff a chance to file written opposition to the motion involved, explaining why the claims, as written, are not time barred or how the claims could be amended to avoid a statute of limitations defense. This issue can more appropriately be addressed in the trial court.

3 . The Ouestion of Whether Plaintiff Stipulated to the Court's Order Sustaining the Demurrer Without Leave to Amend

Defendant asserts that plaintiff stipulated to the trial court's tentative ruling to sustain defendant's demurrer without leave to amend and therefore plaintiff waived his right to appeal the order. We have examined the four-

page reporter's transcript for the hearing on the demurrer and can find no clear showing of the kind of stipulation upon which defendant claims to rely.

At the beginning of the hearing on defendant's demurrer, defendant's attorney represented to the court that plaintiff was going to "accept the tentative."

However, when the court questioned plaintiff about this, plaintiff simply stated he did not wish to present oral argument. It was that kind of an "acceptance". At that point in time, the court was not even aware that plaintiff was in pro per. The court later stated that it felt that the issues in plaintiff's Los Angeles action had been litigated before and should not be litigated again and to this plaintiff replied, "Okay."

Given plaintiff's pro per status, we believe that in order for his answers to constitute a waiver of his right to file an appeal, the court would have had to admonish the plaintiff (1) that it perceived his answers to be an agreement with defendant's assertion that res judicata principles applied to all of his causes of action and (2) that such agreementwould constitute a waiver of his right to appeal the court's order sustaining defendant's demurrer. These admonishments were not given. Thus, we can not, in fairness, find such a waiver.

DISPOSITION

The order of dismissal is reversed and the cause is remanded to the trial court for further proceedings. Plaintiff shall recover his costs on appeal.

NOT TO BE PUBLISHED

CROSKEY, J.

We concur:

DANIELSON, Acting P.J.

HINZ, J.

APPENDIX R

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOR THE SECOND APPELLATE DISTRICT

DIVISION: 3

Wayne T. Ziegler
8033 Sunset Blvd.
Suite 187
Los Angeles, CA. 90046

RE: Ziegler, Wayne T.
vs.
Bank of America – N. T. & S. A.
2 Civil B048869
Los Angeles NO. C736722

* * REMITTITUR NOTICE * *

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision, or order entered in the above entitled cause on 7/24/91 is now final.

** Reversed & Remanded To Trial Court W/Directions **

Appellent To Recover Costs

ROBERT N. WILSON, Clerk

By: M. Gavinski
Deputy Clerk Sep 26 1991

APPENDIX S

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

WAYNE T. ZIEGLER,
Plaintiff and Appellant

v.

BANK OF AMERICA, N.T. & S.A.
Defendant and Respondent

B071580 c/w B065122 and B064366
(Super.Ct.No. C736722)

FILED OCT 06 1994

Appeal from an order of the Superior Court of Los Angeles County. Ronald M. Sohigian, Judge. Affirmed.

Wayne T. Ziegler, in propria persona.

Debbie L. Young, John C. Fauvre, Ullar Vitsut, and Michael J. Halloran for Defendant and Respondent

INTRODUCTION

The Code of Civil Procedure enables the courts, under certain circumstances, to determine that a plaintiff is a vexatious litigant, to require security before permitting such a plaintiff to continue to litigate, and to dismiss an action if such a plaintiff does not furnish the required security. In this case the evidence supports the trial court's finding that plaintiff is a vexatious litigant. We therefore affirm the dismissal of the action following plaintiff's failure to furnish security.

This appeal arises from the trial court's grant of defendant Bank of America's motion to determine plaintiff Wayne T. Ziegler a vexatious litigant under Code of Civil Procedure section 391, subdivision (b)(3) and (4) and finding that Ziegler did not have a reasonable probability of success in the litigation.[1] The court ordered that Ziegler furnish $10,000 security within 60 days.

On September 4, 1992, pursuant to section 391.4, the Bank of America moved for dismissal because of Ziegler's failure to furnish security. On September 30, 1992, the trial court filed a judgment dismissing the action.

Ziegler filed a notice of appeal on November 12, 1992[2].

FACTS

Plaintiff Ziegler has sued the Bank of America five times in recent years, filing complaints in the Superior Courts of the Counties of Sacramento on March 23, 1988, San Francisco on August 17, 1988, and Los Angeles on September 7, 1989, and again on July 29, 1991, and in

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[1] Unless otherwise specified, statutes in this opinion will refer to the California Code of Civil Procedure

[2] A judgment of dismissal following the failure to post security to comply with an order to furnish security as a vexatious litigant is an appealable order. (Roston v. Edwards (1982) 127 Cal.App.3d 842, 845-846).

the Bankruptcy Court of the Central District on March 14, 1991.

This appeal arises from Case No. C736722, filed in Los Angeles County Superior Court on September 7, 1989. A first amended complaint followed on January 10, 1990. The complaint alleged that Ziegler had filed a related action in Sacramento Superior Court on March 23, 1988, based on the Bank's negligence in handling a claim for loss in 1985 under an insurance policy purchased pursuant to a loan agreement between the Bank and Ziegler. This Sacramento County action was dismissed without prejudice on April 14, 1989.

At the May 26, 1992 hearing on the motion to determine Ziegler a vexatious litigant, a different theory of plaintiff's case emerged. Responding to the trial judge's question about which pleading plaintiff sought to go to trial on, Ziegler stated: "The thing that we're going to trial on in this case is the bank's wilful breach of the terms of an out-of-court settlement of a slander suit." Later plaintiff characterized the issues in his complaint as arising "out of the bank's decision to breach the terms of the settlement back in '84 and '85[.]" Plaintiff further stated that the Bank made an agreement with him when he was seven years old which "created a false reputation in the bank." At that time the Bank asked Ziegler to disavow his authorship of "Bell," a poem concerning his pet Collie, a story, "Cashmere," and other early writings because, in plaintiff's words, "they were very controversial writings. The [sic] reflected badly on the bank's decision to prosecute somebody, a borrower, for using force to stop the bank from converting it's [sic] collateral, and it was a very topical issue in 1959, and so I agreed[.]" In a "Brief of Pre-Existing Relationship, 1959-1973," the plaintiff summarized the lengthy history of his dealings with the Bank since he was seven years old.

Despite this history, the complaint alleged that Ziegler had a checking account and a "loan relationship" with the Bank to finance his purchase of a sailboat in 1981. On

August 28, 1981, Ziegler learned that the sailboat had been vandalized the day before.

Because the Bank would not provide documentation necessary for him to purchase insurance, Ziegler asked the Lodi branch manager to order property insurance made available through the Bank pursuant to the loan agreement.

Plaintiff moved the boat to a Stockton marina, where it was vandalized again on December 10, 1981. After discussions about responsibility for repairs, the Bank acknowledged to Ziegler its responsibility for repairs because of the second vandalism. The complaint alleges ongoing disputes and negotiations concerning payment, amounts, and insurance, which resulted in three loan agreements before a fourth and final loan agreement on July 10, 1982.

After losing his job on June 1, 1984, Ziegler agreed to "extend" payments on his loan, and asked a Bank employee to order property insurance on the boat as offered under the Federal Truth in Lending Statement. He was told when negotiating a second "loan extension" on September 24, 1984, that the Bank would order insurance.

On January 1, 1985, Ziegler visited the marina where the boat was stored. He learned that the boat sank on December 18, 1984, during a storm, and that the harbormaster raised it with the aid of professional divers.

Ziegler informed the Bank that the boat had been damaged; that bank-ordered insurance coverage was in force at the time; and that a claim would need to be filed with defendant's insurance carrier, Transamerica Premier Insurance Co. The Bank confirmed that the Lodi branch had ordered a "full coverage" insurance policy on his boat in October.

On January 10, 1985, a Bank employee called Ziegler and demanded that he secure'a claim for coverage of the loss from Ziegler's previous insurance carrier, Farmer's Insurance Co. Ziegler responded that the Bank should

absorb the loss because of its negligence in cancelling insurance coverage ordered in September 1984. During a January 11, 1985, conversation with Mr. Andreotti (a Bank employee) and Bank counsel, Andreotti demanded that Ziegler secure a claim for loss from Farmers Insurance, even though Ziegler had no insurance policy from that insurer in force on the date of the loss. Plaintiff refused to honor the Bank's request and stated he would rely solely on the Bank's insurance coverage. He also stated he stated he would cooperate as best he could with the Bank's filing of claims for loss with its insurer, Transamerica Premier Insurance Co.

After a second meeting on January 15, 1985, plaintiff agreed to order insurance through Farmers Insurance Co. on the condition that defendant seek recovery for the December 18, 1984, damage from Transamerica Premier Insurance Co. Further conversations occurred between Ziegler and Bank employees concerning the dispute over insurance coverage and Ziegler's request for an accounting of his loan payment history.

A representative of Transamerica Premier Insurance Co. informed Ziegler on February 6, 1985, that the insurance it had ordered required the Bank to repossess the boat so as to effect
a claim under the insurance policy. Further discussions ensued between Ziegler, the Bank, and Transamerica Premier Insurance concerning this requirement.

Between January 1 and May 1985, Bank personnel made telephone calls to the president of the firm which employed Ziegler, to disparage Ziegler and convince his supervisor that Ziegler was unfit for his job. These efforts caused the president to deny Ziegler a merit bonus and raise "promised at the time of hire, resulting in an irremedial breach of trust, the plaintiff tendering his resignation on or about May 1, 1985."

The Bank canceled coverage with Transamerica Premier Insurance on May 25, 1985, while assuring Ziegler it would proceed to repossess his collateral and

file a claim for loss under that policy. Ziegler received documentation supporting the Bank's repossession of his boat on July 1, 1985.

Ziegler moved to Los Angeles in August 1985. He received a letter regarding a loss settlement by Transamerica Premier Insurance regarding the sunken sailboat and the Bank's application of the settlement to Ziegler's loan balance. Ziegler telephoned Andreotti, concerning deficiencies in the insurance settlement. Andreotti told Ziegler the insurer had denied Ziegler's request to "total" the boat to the extent of the loan value, $7,500, and that the policy did not allow payment to borrowers in the course of mitigating damage to collateral.

Andreotti disputed Ziegler's view that the boat had suffered more damage since a January 19, 1985 appraisal of damage. Andreotti also asserted that the insurance policy did not cover damage to painted and varnished surfaces. Ziegler demanded an appraisal from Transamerica Premier Insurance and asserted that until he received one he would assume the Bank acted in bad faith. Ziegler also contacted Transamerica Premier Insurance and ascertained that the policy covered damage to painted and varnished surfaces and to the mast.

Ziegler told Andreotti he expected the Bank to self-insure for damage not reimbursed by the Bank's insurance carrier. Andreotti responded that as far as the Bank was concerned the claim process was complete and the Bank would not self-insure for any losses caused because Ziegler's boat sank. Andreotti stated that the Bank was returning possession of the boat to Ziegler as of October 1, 1985. Ziegler refused to accept the boat until the defendant filed a good faith claim with its insurer for all damage to the boat.

On October 5, 1985, Ziegler learned from Transamerica Premier Insurance that while damage to woodwork, painted areas, and to the mast was covered and should

have been paid to the Bank, the claim was closed and the Bank could submit no further claims. Andreotti also stated that while the Bank had agreed to defer payments while Ziegler's claim was being processed, the claim process was closed and the Bank expected Ziegler to resume loan payments on November 15, 1985. Ziegler told Andreotti he would only resume payments upon defendant's repair of damage not covered by the Bank's insurer, as agreed to by the Bank's legal investigations department. Andreotti responded that he would take necessary steps to offset Ziegler's checking account for the loan balance. Ziegler switched his checking account to another bank.

Ziegler was laid off from his job. His employer's controller stated that the firm did not want to become embroiled in the dispute between Ziegler and the Bank.

Ziegler's complaint in Case No. C 736722 contained a cause of action for breach of contract and two causes of action for fraud. The first amended complaint added a cause of action for conversion.

ISSUES

Plaintiff Ziegler claims on appeal that:

1. The trial court exceeded its jurisdiction in failing to follow this court's directions on remand in a previous appeal;

2. The trial court committed reversible error in finding plaintiff a vexatious litigant pursuant to section 391, subdivision (b)(3) and (4);

3. The trial court abused its discretion in finding that plaintiff had no reasonable probability of prevailing in the lawsuit;

4. This court should order this case assigned to one trial judge for all purposes; and that

5. This court should reverse with directions to hold a hearing on sanctions for defendant's counsel's refusal to follow this court's order.

DISCUSSION

1. Trial Court's Compliance with Directions on Remand

Plaintiff claims on appeal that the trial court exceeded its jurisdiction by failing to follow directions in this court's July 24, 1991, opinion. Plaintiff argues that the opinion directed the trial court to determine a statute of limitations issue on remand before any other issue. Plaintiff, however, erroneously construes that opinion and its directions to the trial court.

This court's opinion in Appeal No. B048869 reversed an order of dismissal granted to the Bank of America, and held that the trial court ruled erroneously in sustaining the demurrer based on res judicata.

As regards the particular issue raised in the instant appeal, the opinion rejected the Bank's claim that the statute of limitations barred all claims in Ziegler's complaint. The opinion stated: "The problem with this assertion is that the statute of limitations was not asserted by defendant in the trial court. . . .Any assertion of a statute of limitations to those four causes of action would require giving the plaintiff a chance to file written opposition to the motion involved, explaining why the claims, as written, are not time barred or how the claims could be amended to avoid a statute of limitations defense. This issue can more appropriately be addressed in the trial court."

Plaintiff argues that this court's opinion contained a direction requiring the trial court to determine the statute of limitations issue. The opinion contains no such

direction. Its holding rests on res judicata principles; the opinion rejected a statute of limitations argument because the Bank raised it for the first time on appeal. Although undisputed facts may make the question of limitations one of law, ordinarily resolution of a statute of limitations issue is a question of fact. (Miller v. Lakeside Village Condominium (1991) 1 Cal.App.4th 1611, 1620; Jaffe v. Carroll (1973) 35 Cal.App.3d 53, 59.) As the opinion stated, Ziegler did not have the opportunity to oppose the Bank's statute of limitations defense. For these reasons the trial court would be the best forum to resolve this issue.

The opinion, however, did not require the trial court to rule on that issue. The statute of limitations defense, for instance, may be waived by failure to plead it, or circumstances may estop a party from invoking it.(In re Andrew V. (1991) 232 Cal.App.3d 1286, 1291.) Hence it is usually not jurisdictional. (People v. American Bankers Ins. Co. (1991) 227 Cal.App.3d 1289, 1297.)

It is sometimes said that the statute of limitations defense can be asserted only as a shield, not as a sword. (Lackner v. LaCroix (1979) 25 Cal.3d 747, 752.) The key point is that only a defendant can deploy this shield. Ziegler as plaintiff cannot brandish the statute of limitations as a sword and force the Bank to raise this defense. Since the Bank has not invoked it, the trial court lacked either a reason or an occasion to make a ruling on an issue not before the court. This court's opinion contained no requirement that the trial court make findings on the statute of limitations on remand. Hence Ziegler's argument in this appeal seeking to interpose that lack of findings as a defense to the motion to determine him a vexatious litigant lacks merit.

2. The Trial Court's Determination that Ziegler Is A Vexatious Litigant Pursuant to 391

Plaintiff Ziegler claims on appeal that the trial court erroneously found him a vexatious litigant pursuant to section 391, subdivision (b)(3) and (4).

Section 391, subdivision (b), in its entirety, states: "'Vexatious litigant' means a person who does any of the following:

"(1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.

"(2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.

"(3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

"(4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence."

This statute becomes relevant in light of sections .391.1, 391.3, and 391.4, which permit a defendant to move for

an order requiring a plaintiff to furnish security and for dismissal if the plaintiff fails to furnish that security.

This court subjects the trial court's ruling to a standard of review based on the sufficiency of the evidence. The party moving for security has the burden of establishing the statutory conditions. Where, the evidence conflicts the trial court's implied finding, if based on sufficient evidence, binds this court. This court thus view the evidence in the light most favorable to the judgments of dismissal, i.e., in support of the vexatious litigant determination. (Muller v. Tanner (1969) '2 Cal.App.3d 445, 464-465; Roston v. Edwards, supra, 127 Cal.App.3G 842, 847.

The Bank's motion placed the following allegations before the trial court. Ziegler sued the Bank of America five times. He lost four of those actions although he has appealed orders in other cases. The five complaints allege similar facts, and alleged wrongs perpetrated against Ziegler relate to a loan the Bank made to him to buy a boat. Ziegler also complains about the manner in which the Bank procured insurance for the boat.

The Bank's motion also set forth the outcome in five law suits Ziegler filed against it. In Ziegler's Sacramento action originally filed on March 23, 1988, the Bank obtained a summary judgment based on the statute of limitations on January 9, 1989. In the San Francisco action originally filed on August 17, 1988, the Bank obtained an order sustaining its demurrer without leave to amend on November 21, 1989. In the "first Los Angeles action," Case No. C736722, originally filed on September 7, 1989--the action giving rise to this appeal--the court dismissed the action after granting the Bank's demurrer based on the bar of res judicata and collateral estoppel. Plaintiff did not appeal either the San Francisco or the Sacramento actions, but did appeal the first Los Angeles action.

While that appeal was pending, on August 21, 1990, Ziegler filed a bankruptcy action in the Central District of

California, Los Angeles. The Bankruptcy Court issued an order granting the Bank's motion for a protective order.[3] The court prohibited Ziegler from propounding discovery or contacting the Bank until further court order. On January 30, 1992, the Bankruptcy Court dismissed the case.

Plaintiff filed the "second Los Angeles action," Case No. BC 033836, on July 29, 1991. On January 10, 1992, the court granted the Bank's motion to determine plaintiff a vexatious litigant, and required Ziegler to furnish a $25,000 bond within 10 days.

The motion in the first Los Angeles action, which gives rise to this appeal, argued that the court should determine Ziegler to be a vexatious litigant based on section 391, subdivision (b), parts 3 and 4.

The motion supported this request based on part 3 with the following allegations:

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[3] The Bank alleged that the protective order was necessary because Ziegler had propounded obscene discovery, i.e., a request for admission asking the Bank to "affirm or deny that one of the issues discussed by the plaintiff and the Legal Department was the contention that the plaintiff had invented, used or was otherwise associated with the expression, "I WOULDN'T SUCK THE BANK'S DICK, I'D SUE." The Bank also alleged that Ziegler propounded voluminous discovery, noticing two depositions at 9:00 or 10:30 p.m., made no effort to designate a location for depositions within 100 miles of the deponents' location, and made no attempt to effect personal service on any deponents, even though not all designated deponents were Bank employees. The Bank further alleged that Ziegler's request for production of documents demanded documents previously provided and sought original documents which were unavailable or never existed. Ziegler also sought the private home addresses of the Bank's former General Counsel and of other bank employees.

a. Ziegler propounded discovery requesting the Bank to admit it discussed with him a phrase, "I WOULDN'T SUCK THE BANK'S DICK, I'D SUE;"

b. Ziegler has asked for the same documents repeatedly, disputing that the Bank has produced authentic documents after it has complied with the request;

c. Pleadings and papers filed by Ziegler in this and other courts shows he became obsessed with the death of his collie, "Bell," while he was a child;

d. Ziegler's court documents reflect his paranoid belief that the Bank is persecuting him because he took pity on a person, "Mongo," whom he met in a mental institution and whose car the Bank allegedly repossessed for failing to procure automobile insurance;

e. Ziegler takes credit for coining the phrase, "Give me a break;" for the indeterminate sentencing system now used in California; and for authoring a poem about his collie that created a sensation more than twenty years ago.

The Bank also cited the issuance of a protective order in the Bankruptcy Court and the determination in the second Los Angeles action that Ziegler was a vexatious litigant.

The motion supported the request to determine Ziegler a vexatious litigant pursuant to section 391, subdivision (b)(4) with the allegation that in the second Los Angeles action, Judge Lee declared Ziegler a vexatious litigant and ordered him to furnish security. Section 391, subdivision (b)(4) thus provided an additional ground for deeming Ziegler a vexatious litigant.

That section requires that the prior declaration must have occurred in an action or proceeding "based upon the same or substantially similar facts, transaction, or

occurrence." The Bank's moving papers provided the trial court with a schedule showing similarities between the allegations in the second Los Angeles action and those in the complaint giving rise to this appeal. Our review of the two complaints indicates similarities between them sufficient to support the trial court's ruling.

On both grounds the evidence is more than sufficient to support the trial court's determination of Ziegler as a vexatious litigant under either part 3 or part 4 of section 391, subdivision (b).

On appeal, Ziegler argues the Bank's attorneys in this action were not involved in the 1982 out-of-court settlement; only attorneys in the Bank's legal department in San Francisco were involved. Ziegler concludes that when the Bank's attorney Young disputes facts relative to issues discussed in 1982 or facts relative to his personal history, Young makes those claims without any personal knowledge. The motion and supporting affidavits by Bank attorneys, however, contains only one allegation concerning any 1982 settlement or conversations between Ziegler and Bank attorneys. That allegation cites two complaints filed by Ziegler and no other source. That document supports its assertions by references to the record; nearly all such references derive from Ziegler's' own complaints.

Ziegler's other assertions concerning document requests and the Bank's compliance with them are questions of fact on which the trial court has ruled. To those rulings the standard of review requires this court to defer. Plaintiff's arguments on appeal simply attempt to relitigate matters which were, or should have been, raised in the lower court.

Ziegler purports to argue that the Bank's assertion that he became obsessed with the death of his Collie, "Bell," as a child, and other statements by Bank attorneys, constitute slander. These statements do not fall into any of the categories in Civil Code section 46, defining slander. Even if they did, the absolute litigation

privilege of Civil Code section 47 protects any defamatory statement in documents filed or statements made in court by the Bank's counsel, or, for that matter, by Ziegler himself. (See, e.g., Silberg v. Anderson (1990) 50 Cal.3d 205, 211-216.). We find no basis for disturbing the trial court's ruling determining Ziegler a vexatious litigant.

3. Section 391.1 and the Reasonable Probability of prevailing in the Litigation

Ziegler claims on appeal that the trial court erroneously found that he had no reasonable probability of prevailing in the litigation.

Section 391.1 permits a defendant to move for an order requiring the plaintiff to furnish security. The motion "must be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant."

A trial court's ruling on a motion based on section 391.1 provides a mechanism with the "teeth" to enforce a prior ruling determining a plaintiff to be a vexatious litigant pursuant to section 390. (Stolz v. Bank of America (1993) 15 Cal.App.4th 217, 224.) Both rulings implement the policies underlying the vexatious litigant statutes:

"The vexatious litigant statues were enacted to require a person found a vexatious litigant to put up security for the reasonable expenses of a defendant who becomes the target of one of these obsessive and persistent litigants whose conduct can cause serious financial results to the unfortunate object of his attack." (First Western Development Corp. v. Superior Court (1989) 212 Cal.App.3d 860, 867.). Misuse of the courts also wastes taxpayer money and court resources and causes delay

that prejudices other litigants with real disputes. (Finnie v. Town of Tiburon (1992) 199 Cal.App.3d 1, 17.)

Section 391.1 specifies that the motion must be "supported by a showing," a requirement which reinforces the trial court's fact-finding role and emphasizes our deference to its ruling where supported by substantial evidence. The party moving for security bears the burden of making the statutory showing. Findings, however, are not necessary. (Muller v. Tanner, supra, 2 Cal.App.3d 445, 463-465; Roston v. Edwards, supra, 127 Cal.App.3d 842, 846.)

In the trial court, the Bank's motion addressed this statutory requirement. Ziegler knew his boat sank on December 18, 1984. As to the first cause of action for "deposit fraud," Ziegler anticipated seeking legal remedies against the Bank for failing to account for lost monies in May 1984. He knew by October 5, 1984, according to his complaint, that the Bank deducted money improperly from his checking account.

The third cause of action for conversion arises from allegations that the Bank deliberately converted Ziegler's loan collateral--his boat--by maliciously disposing of it and concealing its acts from the trustee involved in administering Ziegler's bankruptcy estate. The complaint, however, refers to discussions between Ziegler and the Bank based on his belief that pre-conceptions toward the plaintiff within the defendant's organization had been responsible for the vandalisms. Those discussions took place in January and February 1982.

The fourth cause of action for fraud seeks damages because the Bank knowingly provided plaintiff with misleading and fraudulent loan memoranda relating to his loan obligation as well is a claim for loss the defendant was pursuing with its insurance carrier. The "principal fraud" alleged, however, is the Bank's breach of its promise in April 1982 to self-insure for any casualty losses not covered by any insurance contract it should

make available under the loan agreement. This essence restates the second cause of action. As alleged in the fourth cause of action, and as we discuss, infra, defendant alleges that he learned of the Bank's intent to breach this promise on September 25, 1985.

The statutory limitations period on a cause of action for conversion or for fraud is three years. Hence on the first, third, and fourth causes of action for fraud and conversion, the statutory limitations period had lapsed by the time plaintiff filed the complaint. (§ 338, subds. (c) and (d).)

The second cause of action alleges breach of contract. The limitations period for a contract, obligation or liability not founded upon a written instrument is two years. (§ 339.) The limitations period for a written contract is four years. (§ 337.) The cause of action alleges the Bank's failure to fulfill its promise to self-insure for casualty losses not covered by any insurance policy, and the Bank's conduct in processing a claim for a loss arising out of the sinking of plaintiff's boat in December 1984.

The first amended complaint, however, alleges only that Ziegler signed the 1074-8226 loan agreement on June 3, 1982, "with the express mutual understanding of the defendant's loan officer that the defendant would only order insurance, naming itself as the insured, when the plaintiff was in default under the loan agreement and the defendant was in possession of the collateral, at all other times ordering insurance which named both parties as insured." This allegation thus appears to concern an oral contract not reflected in writing. As such it is subject to the two-year limitations period. Ziegler's complaint alleges the he learned of the Bank's intent to breach that promise on September 25, 1985.

The first amended complaint states the second basis for the breach of contract action as follows: "the conduct of the defendant in the processing of a claim for loss arising out of the sinking of the plaintiff's collateral in December, 1984, the defendant's conduct being in bad faith and

intentionally injurious to the contract rights of the plaintiff." The complaint states that plaintiff learned from Transamerica Premier Insurance on October 5, 1985, that the Bank had communicated that no further claims would be submitted.

The four-year limitation period for action on a written contract applies not only to breach of an express obligation under a written contract, 'but also to the breach of an implied promise arising out of a contract. (Beasley v. Wells Fargo Bank. N.A. (1991) 235 Cal.App.3d 1383, 1401.) The allegation against the Bank seems to be one of this kind, that is, arising from a 'fiduciary obligation. In that case the cause of action does not accrue until the beneficiary has knowledge or notice of the act 'constituting a breach of fidelity. (United States Liab. Ins. Co. v. Haidinoer-Haves. (1970) 1 Cal.3d 586, 596.). Such a determination is a question for the trier of fact. (Id., at p. 597.)

The complaint alleges that on November 6, 1984, Ziegler received a third notice from the Bank's insurance center informing him that coverage being ordered "may not protect your equity." On December 26, 1984, Ziegler learned that the Bank had cancelled a full coverage policy ordered on the plaintiff's boat and had ordered in its place a Vendor Single Interest policy. At that time Ziegler attempted to have the insurance reinstated, "relying upon communications supporting the ordering of insurance and the addition of the insurance premium to his loan." The complaint contains lengthy allegations concerning Ziegler's communication with the insurance company and with the Bank, but at least as early as December 26, 1984, he had notice of the Bank's alleged breach.

Since the complaint was not filed until September 7, 1989, it appears to have been time barred by these various statutory limitations periods. We reiterate that questions regarding statutory limitations periods ordinarily remain questions of fact reserved for the trial court. We emphasize that this court reaches this issue

solely for the purpose of reviewing the trial court's determination of the question raised by defendant's motion pursuant to section 391.1 We nonetheless find that the trial court ruled correctly in finding no "reasonable probability that [plaintiff] will prevail in the litigation against the moving defendant."

Aside from the bar of the statutory limitations period, the evidence Ziegler proposed to provide at trial further supports the finding that it was unlikely he would prevail. . At the hearing on the section 391.1 motion, the trial judge inquired whether Ziegler would introduce evidence about his dog, the poem, and his short stories. Plaintiff answered:

"MR. ZIEGLER: My relationship with the bank is determined by those; it's not really determined by a loan agreement; it's not really determined by a checkipg account. It's determined by a policy that the bank has that it dislikes me for disagreeing with. So yes, those will be part of the evidence, and I have other evidence if the court feels its [sic] necessary."

The fanciful and irrelevant nature of this evidence, and plaintiff's characterization of it as determinative, provide a second basis for the trial court's ruling that no reasonable likelihood exists that plaintiff will prevail in the litigation.

4. Other Issues

Ziegler claims that the case be assigned to one trial judge for all purposes. At all times it remained within plaintiff's power to bring all allegations and causes of action into a single complaint filed in a single court. Therefore to assert this claim on appeal is both disingenuous and late in the day.

Our resolution of the issues raised by the appeal from the trial court's ruling granting the motion to determine plaintiff a vexatious litigant, and the subsequent

dismissal of the action following plaintiff's failure to furnish the required security, make this issue moot.

We further find on merit to plaintiff's request for sanctions against defendant's counsel pursuant to Professional Rule of Conduct 5-200(b). As we have found, the record does not indicate that counsel mislead or defied the court in the Sacramento action.

DISPOSITION

The judgment of dismissal is affirmed. Costs are awarded to respondent Bank of America.

NOT TO BE PUBLISHED

CROSKEY, J.

We concur:

Klein, P.J.

Lillie, J.*

*Assigned by the Chairperson of the Judicial Council.

APPENDIX T

COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

WAYNE T. ZIEGLER,
Plaintiff and Appellant

v.

BANK OF AMERICA, N.T. & S.A.
Defendant and Respondent

No. B 071580 c/w B 064366 & B065122

PETITION FOR RE-HEARING

Appeals from the Orders of the Superior Court
for the State of California in and for the
County of Los Angeles
The Honorable Ronald M. Sohigian, &
Honorable Charles Lee & Honorable Stephen O'Neil
Superior Court Cases # C736732 & B033836

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NOTE REGARDING CITATIONS

The Court of Appeal, Division Three, has two separate trial court records in the consolidated appeal. As the issues addressed in the petition apply to Superior Court Case BC033836, citations are made to that record with the following notation (Apx). Citations to the trial court record in Case C 736722 are identified by the following notation(Capx).

I. PETITION FOR RE-HEARING

Appellant respectfully petitions this Court for re-hearing on the issues raised in the Consolidated Appeals of Cases B071580, B065122, and B064366. Appellant's petition is based first, on the grounds that a misunderstanding has apparently arisen as a consequence of the consolidation of Appeals Cases B064366 and B065122 from Division Four with Appeal B071580.

Appeals B064366 and B065122 were both taken from Superior Court Case BC033836. The issues in Case BC 033836 are entirely distinguishable from those raised in Case C736722; the complaint is an action in conspiracy alleging that after the parties had ended their banking relationship in 1986, the bank conspired with employees of a self-storage business(a bank customer), to steal the appellant's original bank statements documenting fictitious ATM entries before the appellant could initiate suit.

Thereafter, the bank's Legal Department supplied in the Sacramento action(August, 1988), forged statements that replaced the fictitious ATM entries with duplicate-numbered check entries. In August, 1990, the bank's Legal Department supplied similarly altered bank statements for the appellant's Noe Valley account, which also contained transactions not shown on the appellant's original bank statements[1].

Appeal B064366 is an appeal from an order entered by the Honorable Judge O'Neil denying appellant's motion to

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[1] To avoid any confusion, appellant uses the word "forged" in the sense that the bank statements supplied by the bank's Legal Department in 1988 and 1990 did not conform to the Lodi Main and Noe Valley bank statements stored in appellant's self-storage unit. Transactions shown on the bank statements proffered after the conversion in 1987 are different than the transactions that were shown on the original bank statements. Some statements have not been been altered, namely those bank statements for months that had very little account activity.

compel inspection of documents pertinent to the issues raised in Case BC033836(namely signature cards, and check copies, if available) and assessing sanctions because the appellant filed the Rule 335 statement with his reply motion. Appeal B065122 is an appeal from an order entered by the Honorable Judge Lee determining the appellant a vexatious litigant, requiring security of $25,000.00.

Both appeals were initially assigned to Division Four. The briefing in Appeal B064366 was completed in August, 1992; the briefing in Appeal B065122 was completed in December, 1992.

The appellant's opening brief in Appeal B071580 before this Division was filed March 31, 1993, and only addressed the issues raised in Case C736722, as did respondent's brief. Because the conduct in Case BC033836 would be better understood in light of the issues raised in Case C736722, the appellant filed a motion to consolidate the three appeals. The appellant's motion was granted, and the two appeals cases were transferred to Division Three from Division Four on October 1, 1993.

The appellant has read this Appeals Court's opinion entered on October 6, 1994, and noticed that the opinion does not address the issues raised in Appeals B064366 or B065122. Appellant presumed that this Court would take up the appeals in the order in which they were filed. The court's opinion suggests that the Appeals Court Justices believed that the parties had briefed all issues on appeal in their briefs filed in Appeal B071580, and had rendered its opinion relying on that belief.

Secondly, the appellant has observed in reading this Court's opinion that certain conclusions have been made, which would have been different had this Court read the briefs filed in Appeals B064366 and B065122, first. For instance, appellant has not filed five suits against Bank of America on the issues raised in Case C736722. Case BC033836 is a continuation of the issues brought in the Bankruptcy Court. Case C736722 is still just the contin-

uation of the issues first raised in the Sacramento Court.

The appellant would also ask for a re-hearing on the basis that the respondent's counsel have manipulated the facts in the records of the two Superior Court cases, which have mislead Judge Sohigian and Judge Lee and this Appeals Court. Most materially, is the misrepresenttation made concerning the significance of the protective order Judge Dooley entered in the Bankruptcy Court, holding up discovery because bank counsel had planted the belief that the appellant lacked standing to propound it. This is an entirely different reality from finding that the discovery was frivolous, as opposing counsel have wrongly asserted.

Appellant is confident he can restore the presumption that an im pro per litigant filing a deceit action for production of false evidence would not engage in the kind of irresponsible behavior bank's counsel have invented in their attempt to avoid responding properly to the issues raised in Case BC 033836.

This Court of Appeal must pass on all material issues that are raised on appeal, especially when two dissimilar lawsuits are before the Court. Appellant sincerely hopes that the Court would grant this petition and reconsider its determination.

II. SUMMARY OF ISSUES RAISED IN PETITION FOR RE-HEARING

The appellant has brought this petition to preserve his right of review in the California Supreme Court. Matters that could have been brought to the Court of Appeal on a petition for re-hearing cannot be raised for the first time in the Supreme Court. Where the Appeals Court mistakenly believed that all issues had been presented in the parties' briefs in one appeal, and enters a decision and opinion thereon, appellant would have no redress for review in the Supreme Court if a petition for re-hearing were not filed to correct for the misunderstanding.

The parties and the Justices of this Court all recognize that the Vexatious Litigant statute was enacted to prevent in pro per litigants from relitigating their claims, having had their cases decided by a judge or jury. In appellant's instance, the bank's counsel have invoked the statute before the appellant has been given a fair opportunity to prove a claim has been stated.

Further, bank counsel have used the vexatious litigant statute as a cloak to demean the appellant in every possible manner, and that conduct is especially worthy of review in the Supreme Court. In appellant's case, review of C.C.P. § 391, and this record, by the Supreme Court could provide some guidance to the trial court's, addressing the balance to assign an opposing parties' counsel's personal opinion attacks on an im pro per litigant's character, versus the issues that are presented to the trial court for evaluation.

III. APPEAL B064366

This appeal involves the issue of the trial court's order denying appellant's motion to compel, and assessing sanctions of $775.00 for filing the Rule 335 Statement with his reply motion, instead of the original motion, when appellant lacked knowledge of the existence of a separate Law and Discovery Rules.

The appellant had understood prior to the appeal being filed that sanctions were not an appealable order, but in researching the recent cases the appellant found **Kohan v. Cohan (1991) 229 Cal.App.3d 967**, and upon reading the case believed that the court's decision permitted an appeal. The appellant was not aware of this Division's later decision in **Rao v. Campo (1991) 233 Cal.App.3d 1559-1569**, which was cited in respondent's brief.

Notwithstanding this apparent conflict in the Courts of Appeal, the order denying the appellant's motion to compel is reviewable from a final order entered in the action. Appeal B 65122 is an appeal from the order of dismissal

entered by Judge Lee, when appellant did not post $25,000.00 security.

The appellant's opening brief in Appeal B 064366 explains thoroughly the appellant's reasons for requesting inspection. Appellant's request was propounded as much to learn if such records even exist, as to view the records. Appellant certainly has right to know what checking account records exist if he's in litigation or not.

This Appeals Court can review the issue fairly by beginning with the Argument on page 22, of the appellant's opening brief.

IV. APPEAL B065122

The trial court's action suggests that the claim that a Bank has embezzled money from a depositor is prima facie frivolous, so no hearing need be heard on the matter. Even **Basch v. Bank of America (1943) 22 C.2d 333**, only involved carelessness on the part of the bank. The production of false evidence is the most serious accusation a depositor could level at a bank.

This court's opinion recognizes that the parties held discussions after the two vandalisms in 1981(pg. 4&5), and that the appellant consummated the 1074-8226 loan agreement on June 3, 1992(pg. 22). Both parties approached the consummation of the 1074-8226 loan agreement as marking a fresh start. Upon signing the 1074-8226 loan agreement, Ms. Minton suggested and appellant agreed to close his Arden Way account, and open a checking account with Lodi Main(Acct 0107-03354). The signature card was signed then(Apx 30:14-18).

The statements the bank's Legal Department supplied in 1988 do not begin with that date. The statements also did not reflect the 154-83308 loan auto-debit the parties consummated on July 10, 1992, beginning with the July, 1982 statement(Apx 31:3-9). Further investigation revealed the large number of checks bearing the same check number(Apx 117-118).

After the Sacramento action concluded, the appellant met with attorney, Irvine Dungan, in Sacramento about the statements[2].

A. THE BANK'S DEMURRER CLAIM

The bank's counsel demurred stating that the appellant had received the Lodi Main(and Noe Valley) statements in their present form while maintaining both accounts(Apx 233-244). The trial court did not take up this issue, but as Ms. Young has presented the possibility, the appellant will address it and show that its no defense to a recovery action.

All checks come with a microcode printed on the bottom that shows the depositor's account number. Sometimes, checks are shows the depositor's account number. Sometimes, checks are damaged, and a bank will place the check in a plastic jacket. Bank personnel then key the account number on an encoder. The account number is printed on the bottom of the envelope while it passes through the encoder.

If the bank did, in fact, post other customer's checks to appellant's account by encoding an envelope with the appellant's checking account number, it would certainly explain the duplicate checks. Of course, in doing so, then Ms. Young is defending the false evidence issue with the defense that the bank took money out of appellant's account, without due care.

The California Supreme Court promulgated the rule in **Bullis v. Sec. Pac. Sec. Bank (1978) 21 Cal.3d 801-815**, the bank must return any funds, if paid out of a depositor's account, without due care. The Supreme

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[2] Mr. Dungan suggested filing in Los Angeles where the conversion occurred. Mr. Dungan also supplied an accurate outline of what to expect, described in appellant's affidavit attached to this petition. Mr. Dungan represented the plaintiffs in Wyatt v. Union Mortgage Co (1979) 24 Cal.3d 773.

Court also upheld the applicability of **C.C.P. § 348** to actions to recover funds paid out wrongly. The bank is required to return any funds that it removed from the appellant's accounts, if it took the funds in this manner.

(continued to Section C.)

C. THE TRIAL COURT CONDUCTED NO INQUIRY INTO APPELLANT'S PROBABILITY OF PREVAILING IN THE ACTION.

The Court's minute order declaring appellant a vexatious litigant stated(Apx 856): "Motion granted on grounds set forth in the moving papers, per C.C.P. § 391(3). Demurrer taken off-calendar."

The bank's motion to declare the appellant a vexatious litigant(Apx 245-262) in this action was fatally defective because there was no discussion addressing whether the appellant could prevail on the issues raised. For the court to grant the motion without first requiring the bank to comply with the requirements of **C.C.P. § 391.1** is reversible error.

It could be construed that the bank complied with **C.C.P. § 391.1** by concurrently filing a demurrer(Apx 231-244), but the demurrer does not address the issues in this complaint, either. The suggestion cannot be maintained, however, because Judge Lee did not read the bank's demurrer, the Court stating at hearing:

> "Well, I took them up in the order of the -- whether or not this plaintiff is a vexatious litigant, and if the answer to that was yes, then for him to go further would require the posting of a bond, and...(R/T 4:24-48)"

The Court went on to state:

> "I have not prepared or worked up the demurrer

> because of my conclusion as to the vexatious litigant issue to grant the motion.(R/T 5:1-4)"

Given Ms. Young's admission that her argument on appellant's probability of prevailing was presented in the demurrer(R/T 4:17-22), and the Court's own admission that it had not "worked up the demurrer...", clearly the court had not performed any evaluation on appellant's likelihood of prevailing in this suit. This alone, is clearly error mandating reversal.

The appellant filed a motion for reconsideration with the hope of preventing the delay associated with the appeal of a case where reversal was certain, which was heard on February 20, 1992 (Apx 859-886). The court's tentative ruling stating(Apx 1163):

> "Denied. C.C.P. § 1008 factors are not present. Also, implicit in the court's ruling of 1/10/92 is the court's finding that there is no reasonable probability that the plaintiff will prevail in trial against the moving party."

The appellant asked the court what it considered the issue raised in the complaint to be; Judge Lee avoided the question. Appellant then asked the court what it found implicit in the prior order requiring security that supported its finding that the appellant had no probability of succeeding in the suit(R/T 11:2-12:3). Judge Lee declined to explain his decision.

When the trial court is not inclined to look at the issue raised in the complaint impartially, or to even acknowledge the issue, then it cannot be maintained that the appellant had a fair opportunity to show his ability to prevail as required by **C.C.P. § 391.1**.

In the present instance, there was nothing for Judge Lee to review in the bank's motion, and Judge Lee admitted that he didn't review the demurrer. So the review required by § 391.1 never took place. The combined defects

in the motion and demurrer mandates reversal of this case.

D. THE TRIAL COURT ERROR WAS CAUSED DIRECTLY BY MISCONDUCT ON THE PART OF THE BANK'S COUNSEL.

Judge Lee found, presumably, that the statements at issue in this lawsuit were received by the appellant in their present form while he maintained the Lodi Main and Noe Valley accounts, and that the entries bearing duplicate check numbers were, in fact, real checks the appellant wrote and signed. There is not a scintilla of evidence in this record to support that conclusion.

The trial court's finding is based solely on the opinion of the bank's counsel, which is an opinion not supported by any fact in this record either. The 215 duplicate check entries and 203 blank checks on the statements are facts, facts that are not supported, and the trial court record reflects that the trial court relied solely on Ms. Young's comments in open court:

> "I don't know how to respond to say that they're fabricated except to say that they aren't.(R/T 12:4-20)."

Ms. Young's personal opinion or personal belief is no substitute for a factual showing, *and no basis for a finding by any court*. Ms. Young could make this statement if she had produced the signature cards for the two accounts at hearing as promised[3]. Counsel's beliefs,

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[3] Ms. Young's letter dated January 8, 1991(Apx 1225), documents the appellant's meeting with Ms. Young on December 20, 1991, in which Ms. Young agreed to permit inspection of COPIES of the appellant's signature cards. The appellant called Ms. Young on January 9, 1991, to arrange inspection prior to hearing. Ms. Young promised to bring the copies to hearing and allow inspection then. When Ms. Young read the

and her concealment of critical evidence, caused Judge Lee to rule erroneously.

V. THE TRIAL COURT FINDING UNDER C.C.P. § 391(b)(3) IS SUPPORTED ONLY BY OPPOSING COUNSEL'S MISREPRESENTATION OF FACTS IN THE RECORD.

This Appeals Court is bound to reverse any trial court order where it is shown on the basis of available facts in the record that the order was obtained by one party's misrepresentation of material facts in the record.

This Appeals Court has already heard one appeal (B048869) where opposing counsel mislead the trial court to believe that a judgment entered in Sacramento was on the merits, invoking the bar of res judicata. Counsel achieved this by leaving the motion for summary judgment out of the record, so Judge Huss would not know what was decided. Opposing counsel left out the reporter's transcript so Judge Huss would not know what Judge Cristoforo said.

Opposing counsel also represented in respondent's brief that the appellant had stipulated to the trial court ruling, when the appellant had done no such thing. This Court recognized the lack of factual support for either claim in its opinion.

Opposing counsel's misrepresentations in Appeal B 048869 fell into two categories: (1) Representing to the court as a fact the nature of a judicial decision involving the parties, when there was no evidence to support counsel's characterization, (2) Representing to the court as a fact appellant's conduct, when the appellant has not acted in the manner described.

This Division's diligence in Appeal B 48869 protected the appellant from bank counsel's quest for an unjust for-

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court's tentative ruling in her favor, she changed her mind and refused inspection.

feiture. The record on appeal also shows that prior to filing Case C736722, the appellant filed on March 23, 1988, a timely single cause alleging the bank had interfered with appellant's property interest in his sailboat by its handling of the claim process in 1985. The bank's attorneys represented to Judge Cristoforo that the facts alleged actually plead interference with appellant's person, subjecting the action to the one-year limitations period in C.C.P. § 340[4].

The appellant had filed an amended complaint before the hearing, and at hearing this was brought to Judge Cristoforo's attention, the judge noted on the record appellant could re-file his amended com-plaint as a new action.

Defending an action in conversion, with the one-year limitation period applicable to personal injury cases, and taking the resulting judgment obtained and asserting it as invoking the bar of res judicata, is not conduct taught in Law School in a course on Civil Procedure. This conduct is addressed in a course devoted to preparing attorneys to recognize bad faith tactics.

The practical impact of the bank's attorneys running quick into Sacramento Superior, and even quicker into Los Angeles Superior is that appellant was deprived of an opportunity to put into issue in Case C 736722 the most important cause, the embezzlement of funds on appel-

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[4] Actions in conversion are governed by the 3-year limitation period specified in C.C.P. 338(c). The actions constituting the wrongful conduct includes (1) Obtaining claim proceeds paid in August, 1985, by submitting an appraisal to Transamerica that understated the damage to the sailboat, significantly, (2) refusing to take a second appraisal of obvious damage omitted from the first appraisal, (3) failure to report an accurate loan balance that would allow appellant to pay off his sailboat loan from December, 1984 through April, 1986, and (4) failure to give notice and hold a reasonable commercial sale as dictated by California Commercial Code 9505(1).

lant's Lodi Main checking account, by means of fictitious automatic teller entries.

The courts have a right to presume that the parties are telling the truth when they present an issue to a court for decision. A reviewing court's responsibility is to assure that the trial court judgment is based on a factual showing. As stated by the Supreme Court in **Bullis v. Security Pac. Nat. Bank(supra), pg. 815**:

> "A trial court's exercise of discretion will be upheld if it is based on a "reasoned judgment" and complied with the ...legal principles and policies appropriate to the matter at issue."

The issue in Case C 736722 is the bank's willful breach of the terms of an out-of-court settlement integrated into the 154-83308 loan agreement. The opposing party is not required to admit any facts involving the out-of-court settlement, and the trial court is required to treat the facts alleged in the complaint as true for the purpose of determining if the appellant has stated a cause of action for which relief may be granted[5].

The clear Legislative intent behind the Vexatious Litigant Statute is based on actual cases, **Taliaferro v. Hoogs (1965) 236 C.A.2d 521**, and has been applied consistent with the Legislative intent, **First Western Development Corp. v. Superior Court (1989) 212 Cal.App.3d 860-871**. A statute's language must be

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[5] The impetus for settling the various issues that arose in 1981 was not impressed upon the bank's Legal Department by the appellant's bargaining position. Appellant was employed by a wealthy businessman in Lodi who was equally tired of the bank's attempts to persuade him that his controller had invented the profane expression identified in the record, and entirely willing to put his wealth to the task of correcting the Legal Department's propensity for demeaning the appellant's character in the manner documented in this Appeals Court record.

interpreted in accordance with the purpose for which it was enacted. The Vexatious Litigant Statute was enacted into law to prevent im pro per litigants from relitigating issues or from pursuing frivolous claims. The claim duplicate check entries are outside of customary banking practice is not a frivolous claim.

The appellant propounded discovery in the Bankruptcy Action to prove the fact. Opposing counsel's argument under **C.C.P. § 391(b)(3)** that Judge Dooley entered a protective order in that forum on the grounds the discovery requested was frivolous is refuted by the record[6]. First, ederal Courts recognize that the debtor-in-possession has a constitutional right to conduct discovery related to estate matters, including estate litigation.

The record shows that the bank did not even respond to discovery appellant propounded. The bank's counsel filed a motion to dismiss the complaint for lack of standing (Apx 635). The defense of lack of standing goes to the appellant's right to even be a party to an action. So attacking a person's standing to sue is a convenient approach to avoid responding to discovery.

At hearing, Ms. Barker misrepresented to Judge Dooley that the trustee was taking no action(Apx 742:1-11), when counsel knew that Ms. Loder had not been reappointed as trustee because she had rejected Ms.

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[6] The Bankruptcy Complaint stated the conspiracy action and deceit actions alleged in Case BC 033836. The complaint also included a Fourth Cause of Action for bad faith denial of the 154-83308 loan agreement, owing to the bank's Legal Department's assertion in the reply brief filed in Case C 736722:

> "However, Exhibit A to the Los Angeles Complaint shows in the upper right hand corner that Loan No. 1074-8226 became Loan No. 154-83308, only the numbers were changed"(Capx 300, 17-25)

The bad faith denial of a contract cause is in the appellant's Second Amended Complaint filed in Case C736722. That complaint documents that there was a significant slander issue settled in 1982.

Barker's settlement offer for lack of capacity (Apx 722). Judge Dooley asked for input from the appellant, and appellant explained that the issue involved conspiracy, and that he had trustee approval to go forward. Judge Dooley stated:

> "The Court would require a written statement... that would let the Court know that the trustee doesn't go forward."(Apx 745, 12 - 746 1).

Judge Dooley granted the protective order, indicating his intent right then:

> "I'll hold up all discovery."(Apx 746,17-22)

Holding up discovery pending a determination by Judge Dooley that the appellant had stated a claim, and pending the trustee confirming her non-assignment, does not amount to a finding that the discovery was frivolous. Bank counsel planted sufficient doubt about appellant's standing to propound the discovery, and that's all opposing counsel achieved.

Appellant filed a motion for a new hearing and to vacate the protective order upon receiving the trustee's letter(Apx 734). The fact that Judge Dooley's first concern was still the issue of standing was made apparent by his question to bank counsel:

> "Do you withdraw your grounds based upon standing...let me ask a...Ms. Bauer."(Apx 752 7-13)

Ms. Bauer was unsure, and urged Judge Dooley to abstain on the issues(ibid, 21-25):

> "...all the issues should probably stay in state court so that we can litigate them all there,"

As this Appeals Court had removed the bar of res judicata,the appellant had no reason not to proceed in state court on the issues. Upon stating his agreement, Judge Dooley indicated that the court would abstain and Judge Dooley subsequently entered orders to that effect(Apx 758-759)[7].

Opposing counsel's argument before both Judge Lee and Judge Sohigian, for what transpired in the Bankruptcy Court, is no different than counsel's conduct before Judge Huss; misrepresenting what judicial decisions were rendered by other judges who have looked at the issues impartially, and accusing the appellant of engaging in improper conduct, when the appellant has not.

The bank's conduct in the Bankruptcy Court is useful only for documenting the intent behind the loan fraud scheme the bank's Legal Department adopted in 1985, to force the fictitious ATM entries issue into the hands of an unknowing trustee, with whom the bank's counsel could bargain an unjust forfeiture.

The remainder of the bank's vexatious litigant argument under **C.C.P. § 391(b)(3)**, is merely bank counsel's opinion about the appellant's past. Needless to say, opin-

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[7] Judge Dooley entered two orders; an order of abstention on the adversarial action(Apx 758-759). The second Order vacated the re-opening of appellant's bankruptcy case because there were no assets to administer(Apx 760-761). The bank submited a proposed order of abstention containing the language that the dismissal of the action would dismissed in the best interests of the debtor and creditors. This language did not reflect Judge Dooley's decision as expressed to the parties at hearing, where he indicated he would abstain. Judge Dooley lined out the objectionable language refering to Section 305(c) and wrote in his own handwriting that the Court would abstain because the Court had reversed its order to re-open the case. Judge Dooley's care to do so is reflective of his intent that the appellant not be prejudiced by his ruling from proceeding with the action.

ions of bank counsel about facts that they have no knowledge of, are not facts.

The burden is on the complaining party to establish the circumstances surrounding the creation of a contract, and the appellant relied on statutory authority under **Civil Code § 1647**, to establish how the appellant acquired a reputation in the bank's organization. A pre-history of antagonism directed toward the appellant was material to the court's evaluation of the conditions of the settlement as integrated in the terms of the parties' 154-83308 loan agreement. Appellant relied, here, on **Evidence Code § 210**, which defines material evidence as:

> "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove a disputed fact that is of consequence to the determination of the action."

Evidence Code § 351 provides that all relevant evidence is admissable. The trial court has the discretion to exclude any evidence pursuant to **Evidence Code § 352**, if the evidence has no probabative value to establish a material fact, or if its unduly prejudicial. No one has been prejudiced by appellant's evidence.

The poem, Bell, and the two short stories are in the record because they were the subject of the conversations appellant had with Bank of America employees the first 5 months of 1982, to diffuse the misconception that Bank of America employees had been responsible for Bell's abduction after the appellant met Mongo.

Appellant's affidavit describing the facts that lead up to his agreement with a bank representative in 1960 to disavow authorship is direct experience, relevant to explaining how the appellant acquired a reputation in the bank for disagreeing with the bank's policy toward insuring the borrower's collateral.

The trial court has discretion to exclude evidence, but not for finding the appellant a vexatious litigant when the appellant is merely disclosing what created his relationship with the bank.

Bank counsel's disputes of immaterial facts in appellant's affidavits? Appellant couldn't care less if a trial court or an attorney wants to disbelieve any fact about appellant's past, the appellant doesn't need to inflate his ego to allege a production of false evidence issue. Of course, the bank's counsel needs to diminish the appellant's past to distract the trial court judges from taking the issue seriously, and decide it correctly.

Appellant's affidavit on the Mongo Affair merely describes what happened when the appellant witnessed an accident in 1959. The Legal Department's belief that it was entitled to greater protection under the law ran head on into Mongo's due process rights. In 1994, the Legal Department's belief that it is above the law has run into the appellant's due process rights, and the trial courts have erred, again.

The appellant is not concerned, the Federal District Court has original jurisdiction over appellant's bankruptcy estate's claim for funds. A District Judge will certainly see the bank's conduct before every judge in every action in its proper light.

Judge Sohigian's questions to appellant at hearing on trial plans were leading, and caught appellant off-guard. Appellant has never contemplated that either suit would ever be presented to a jury, its the last thing the bank's Legal Department wants. Appellant's comments at hearing prove only that he's not an expert on the law. Mr. Dungan will handle any trial matters.

There is insufficient evidence for this court to uphold a finding under C.C.P. § 391(b)(3). This court should reverse its affirmance.

Continued to Conclusion

VII. CONCLUSION

By the bank's counsel conduct before the trial courts in the two actions that are before this Court of Appeal, the Justices reasonably see that the bank's motion to declare the appellant a vexatious litigant has at its heart the intent to deny the appellant due process of law.

Judge Lee, in Case BC 033836, did not hold a hearing on the issue of a conspiracy to produce false evidence, and this Court cannot affirm his decision. Judge Sohigian was the fairest judge I have been before, but his judgment is no less void according to controlling Supreme Court precedent.

However, on the basis of this record, this Appeals Court should understand that opposing counsel's conduct in demeaning the appellant's character in the record is no basis for finding the appellant a vexatious litigant. The Court should also understand that such comments are motivated by the simple intent to deprive the appellant of his due process rights to be heard.

With all due respect, the appellant petitions this Court to reverse the conclusions arrived at it in its opinion on the basis of the factual showing presented in this petition, or hold a re-hearing so that the appellant can dispel any remaining uncertainties the Justices might have concerning his integrity.

Date: October 21, 1994

/s/ Wayne T. Ziegler
Wayne T. Ziegler,
appellant and
attorney in pro per

APPENDIX U

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 3 Date: 06/26/96

Wayne T. Ziegler
1541 N. Martel
#233
Los Angeles, CA. 90046

RE: Ziegler, Wayne T.
VS.
Bank of America N. T. & S. A.
2 Civil B064366/B065122
Los Angeles NO. BC033836

THE COURT:

MOTION TO RECALL THE REMITTITUR-VACATE OPINION AND REINSTATE THE APPEAL IS DENIED. THE APPEAL IN THIS MATTER WAS DECIDED BY OUR OPINION FILED ON OCTOBER 6, 1994 AND IT IS NOW FINAL.

APPENDIX V

IN THE SOUTHERN DISTRICT COURT

IN THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

C.A. No. H-97-1492

ORDER

WAYNE T. ZIEGLER,

vs.

BANK OF AMERICA, N.T. & S.A.

Pending before the Court is the Motion to Dismiss (Document #7) filed by the defendant Bank of America ("the Bank"). After considering the motion, the submissions and the applicable law, the Court determines the Motion to Dismiss should be granted.

On March 23, 1988, Plaintiff Wayne T. Ziegler filed his first of six California lawsuits against the Bank in Sacramento Superior Court, California. Ziegler's "Complaint based on Negligence" against the Bank sought $2.4 million in relief for the alleged emotional harm inflicted upon him by the Bank's negligence and carelessness in ordering insurance on the plaintiff's boat, which was inferior to the insurance the plaintiff had ordered," among other negligent allegations. Ziegler also accused the Bank of destroying his boat which was the

collateral for the Bank's loan. The Superior Court granted the Bank's motion for summary judgment on April 14, 1989.

On August 17, 1988, Ziegler filed his second lawsuit in San Francisco claiming "Intentional Tort Product Liability" based on the same boat loan and insurance issues complained of in his first lawsuit. On November 16, 1988, the San Francisco Court dismissed the lawsuit.

On September 7, 1989, Ziegler filed his third lawsuit in Los Angeles state court (the "First Los Angeles suit"). This Complaint based on Breach of Contract, Fraud" alleged similar facts to those alleged in this case, including allegations dating back to 1959 when Ziegler was seven years old. Ziegler alleges that in 1959 he made a "goodwill visit to a state mental hospital in Watsonville, California." There he met a former Bank of America borrower, convicted of assault for attempting to prevent a bank employee from taking his vehicle and given an "indeterminate sentence." From this visit at the age of seven, Ziegler formulated the opinion that "indeterminate sentences constituted cruel and unusual punishment, and were therefore unconstitutional." Ziegler nicknamed this patient, "Mongo". Ziegler further alleges that medical professionals in Santa Cruz were "incensed" by his opinion on indeterminate sentences and retaliated by kidnapping his collie, Bell, two weeks before Christmas, 1959. The same medical professionals proceeded to threaten to kill Bell unless Ziegler wrote a song.

To expose the conduct of doctors, the plaintiff [Ziegler] authored a poem titled, 'Tender Bell'. The poem and other literary works the plaintiff authored, focused public attention upon the conduct of doctors who kidnapped the plaintiff's collie, and upon the bank's decision to prosecute Mongo, and the state's decision to incarcerate Mongo in a mental hospital with an indeterminate sentence. To minimize continued public attention...on the bank's decision to prosecute Mongo, the plaintiff agreed in May, 1960, at the request of a Bank of America

representative, to disavow authorship over his creations. See Plaintiff's Complaint at 3. On March 8, 1990, this first Los Angeles suit also was dismissed.

On August 21, 1990, Ziegler filed his fourth lawsuit against Bank of America in the Bankruptcy Court of the Central District of California, Los Angeles. This case was dismissed on January 30, 1992.

On July 29, 1991, Ziegler filed his fifth lawsuit against the Bank in Los Angeles (the "Second Los Angeles" suit) and it was dismissed on June 30, 1992. Ziegler filed various appeals, including an appeal of the dismissal of the first Los Angeles suit, which was ultimately reversed by the California Court of Appeals and remanded and finally dismissed on September 30, 1992, pursuant to an order and judgment dismissing the action for failure to file a "vexatious litigant" bond.[1] Ziegler's later appeals of the first and second Los Angeles suits were consolidated. The appellate court upheld the dismissal and agreed with the trial courts that Ziegler "repeatedly files unmeritorious motions, pleading, or other papers, conducts unnecessary discovery, or engaged in other tactics that are frivolous or solely intended to cause unnecessary delay" Furthermore, the Appellate Court held that the Bank convincingly showed that Ziegler's claims were barred by the applicable statute of limitations periods, and noted Ziegler's reliance on "fanciful and irrelevant evidence" about his dog, the poem and his short stories.

On April 24, 1995, Ziegler filed his sixth lawsuit against the Bank in the United States District Court for the Central District of California. Ziegler sued numerous attorneys in the Bank of America's legal department in their individual capacities as well as the Bank of

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[1] The California Code of Civil Procedure section 391, subdivision (b)(3) and (4) enables the courts, under certain circumstances, to determine that a plaintiff is a vexatious litigant, to require security before permitting such a plaintiff to continue to litigate, and to dismiss an action if such a plaintiff does not furnish the required security.

America. Ziegler alleged the same events in his previous complaints while adding federal claims for mail fraud and civil rights violations. The federal court action was dismissed without leave to amend pursuant to Memorandum and Order dated January 26, 1996. The dismissal cited "plaintiff's failure to exercise due diligence in preserving his legal rights, and additionally, his failure to act in good faith regarding these controversies with defendants." See United States District Court Central District of California Memorandum and Order at 4, fn 5, lines 20-27. Ziegler now seeks relief on the same or similar allegations.

The Bank asserts that Ziegler's claims are barred by res judicata. Res judicata is a well settled principle of law which rests at bottom upon the grounds that the party to be affected, or some other with whom he is in privity, has litigated or had the opportunity to litigate the same matter in a former action in a court of competent jurisdiction. Richards v. Jefferson County, 116 S. Ct. (1996). Since this is Ziegler's seventh lawsuit based on the same underlying facts involving his Bank of America loan for the purchase of a boat and the purchase of insurance on the boat in 1981, this claims is barred by the doctrine of res judicata. Ziegler has had ample opportunity to raise any related issues, disputes or allegations in any one of his previous six lawsuits.

Based on the foregoing, the Court hereby

ORDERS that the Motion to Dismiss (Document #7) is GRANTED.

SIGNED at Houston, Texas on this 19 day of May, 1998.

/s/ David Hittner
David Hittner
United States District Judge

APPENDIX W

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20583

Summary Calendar

WAYNE T. ZIEGLER,

Plaintiff-Appellant,

v.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION,

Defendant-Appellee,

Appeal from the United States District Court
for the Southern District of Texas
(H-97-CV-1492)

Before KING, Chief Judge, POLITZ and BARKSDALE, Circuit Judges.
Per Curiam:*

Wayne T. Ziegler appeals from the district court's order granting the Bank of America's (Bank) motion to dismiss his diversity complaint on the res judicata grounds.

Ziegler has filed several lawsuits in California state courts containing allegations that are almost identical to those raised in his complaint in federal district court in Texas. To varying degrees, the instant lawsuit and the California complaints all allege that in the 1980s the Bank fraudulent depleted accounts that Ziegler maintained with the Bank at various California branches and that Bank employees sank his sailboat over disagreements about a loan Ziegler had with the bank. The instant complaint, like some of Ziegler's California actions, also alleges that Ziegler's sour relationship with the Bank dates to his childhood in the 1950s, when mental-health employees, apparently in a conspiracy with the Bank, kidnapped a pet collie belonging to the then-seven-year-old Ziegler because Ziegler had publicly supported a mental patient who had allegedly been victimized by the Bank's loan practices.

This Court can affirm the district court's dismissal on any ground fairly supported by the record. See Nagle v. Lee, 807 F.2d 435, 439 (5th Cir. 1987).

The district court's jurisdiction in this case was based on diversity of citizenship; we therefore must apply Texas law, including Texas statutes of limitations. See Vincent v. A.C. & S., Inc., 833 F.2d 553, 555 (5th Cir. 1987).

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*Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 46.5.4.

Under Texas law, the statute of limitations is a procedural issue that is governed by the laws of the state in which the claim is brought, in this case, Texas. See Hill v. Perel, 923 S.W.2d 636, 639 (Tex. App.—Houston [1st Dist.] 1994, no writ); Los Angeles Airways, Inc. v. Lummis, 603 S.W.2d 246, 248 (Tex. Civ. App.—Houston [f14th Dist.] 1980).

From the face of Ziegler's complaint it is clear that he had knowledge of the underlying facts giving rise to his claims in 1993. Thus, the statute of limitations has expired on each claim under Texas law. See Tex Civ. Prac. & Rem. Code Ann. § 16.003 (setting forth two-year statute of limitations for claims based on fraud and taking of personal property of another). The district court's judgment is AFFIRMED. Ziegler's motion "to take judicial notice of applicable California statutes and cases" is DENIED as unnecessary.

May 25, 1999.

APPENDIX X

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. CV 95-2706-GHK(BQRx)

MEMORANDUM AND ORDER

WAYNE T. ZIEGLER,
Plaintiff,

vs.

BANK OF AMERICA, N.T. & S.A., MR. WINSLOW CHRISTIAN, MS. JARYN BARKER, MS. DEBBIE YOUNG, AND MR. JOHN FAUVRE,
Defendants

I.
Introduction

This matter is before the court on defendants Bank of America ("BOA"), Winslow Christian, Jaryn Barker, Debbie Young and John Fauvre's motion to dismiss pursuant to Fed. R. Civ. Pro. 12(b)(1), 12 (b)(6) and 12(e). The First Amended Complaint ("Complaint") of pro se plaintiff Wayne T. Ziegler raises six claims[1].

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[1] Claims 1-III and V are allegedly pleaded under 28 U.S.C. § 1334(d); Claim IV purports to state a claim for conspiracy relying on 18 U.S.C. §1341 and 1964; Claim VI aspires to assert a conspiracy claim under 42 U.S.C. § 1985(3).

Plaintiff contends that this court has subject matter jurisdiction over this action because each of his claims allegedly presents a federal question. 28 U.S.C. § 1331.

II.
§ 1985(3) Claim

Plaintiff's opposition brief confirms defendants' assumption that Claim VI, the 42 U.S.C. § 1985 issue, was intended to allege a violation of subsection (3) of that section. Opp. at 2, 24-26. Plaintiff moreover concedes that his sixth claim fails to state a claim against defendants pursuant to § 1985(3) in that, among other problems, the Complaint fails to allege that the conspiracy was motivated by racial animus or animus against a member of a class that warrants special federal assistance in protecting civil rights. See Griffin v. Brekenridge, 403 U.S. 83, 100-02, 101 91 S. Ct. 1790 (1971); Schultz v. Sundberg, 759.2d 714, 718 (9th Cir. 1985). Plaintiff moreover fails to allege facts in support of the § 1985(3) state action requirement. United Bhd. Of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825, 830-31, 103 S. Ct. 3352 (1983). Defendants' reliance, in previous actions, on the California vexatious litigant statute does not constitute the requisite government interference. See Cal. Code of Civ. Proc. §391 et seq.; Cf. Briley v. State of California, 564 F.2d 849, 855 (9th Cir. 1977); Phillips v. International Ass'n of Bridge, S. & O. Wkrs., 556 F.2d 939, 940-41 (9th Cir. 1977). Accordingly, defendants' motion to dismiss this claim is GRANTED[2].

[2] Plaintiff's desire to replead, alleging a 42 U.S.C. § 1983 claim, would be futile in light of the state action and statute of limitations requirements of that statute. See Briley at 849, 855; Phillips at 940.

III.
RICO CLAIM

Plaintiff's Claim IV seeks damages under 18 U.S.C. § 1341 and 18 U.S.C. § 1964 for an alleged conspiracy to produce forged evidence. Plaintiff posits that defendants conspired to produce a forged record of account (the "88 DMR Record") for plaintiff's bank account in the Lodi Main Bank of America branch[3]. Section 1341, the criminal mail fraud statute, does not in itself afford a damages remedy to plaintiff. However, plaintiff's reference to RICO remedies section 1964 and the Opposition to this motion indicate that he attempted to allege a civil claim under RICO § 1962(a). See Racketeering and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1962(a), 1964(c).

Liberally construing the Complaint's allegations of the first two claims to additionally constitute allegations of RICO predicate acts under Claim IV, the court renders it unnecessary for plaintiff to amend, as requested to specifically allege these facts under Claim IV. Taking these allegations into account, plaintiff's predicate acts began in February, 1982 and ended in August, 1988. Opp. at 19-21; Complaint ¶¶ 156-158[4]. The statutory limitations period on RICO claims is four years. Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 1465, 107 S. Ct. 2759 (1987). Thus the limitations period

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[3] Plaintiff admits that this claim is "essentially the same cause of action filed in Los Angeles Superior Court Case BC033836, " which was dismissed when plaintiff refused to post security as required upon the court's finding that he was a vexatious litigant. Opp. At 15, Request for Judicial Notice at 5. The court of appeal upheld the dismissal. Id.

[4] Plaintiff's allegation that defendant Young repudiated "a written promise to allow inspection of the signature card for account 10702-03354 on January 10, 1992," does not constitute a RICO predicate act within the definition at 18 U.S.C. § 1961(1)(B).

expired in August, 1992. Plaintiff filed this action on April 24, 1995, his claim is therefore time barred.[5] Accordingly, defendants' motion to dismiss is GRANTED as to the RICO claim.

IV.
Claims I-II and V

Plaintiff asserts that this court has jurisdiction over his first three claims and Claim V, pursuant to 28 U.S.C. § 1334(d)[6]. The theories of recovery for these claims are based on California law. See Cal. Civil Code §§ 1710, 1712; Cal. Code of Civil Proc. § 348. Claim I seeks to recover $8,186.12, which alleged constituted property

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[5] Plaintiff argues that his claim is entitled to equitable tolling because its allegations mirror a federal bankruptcy action in the Central District Court (Case No. 860775 JD, Adversary No. AD91-61032JD) and Los Angeles Sueprior Court action No. BC 033836. Opp. At 18, 23. Plaintiff's reliance on equitable tolling is without merit. Federal law governs the tolling of RICO claims. Emrich v. Touche Ross & Co., 846 F.2d 1190, 1199 (9th Cir. 1988). Federal courts typically only sparingly extend the relief of equitable tolling. Irwin v. Department of Veteran Affairs, 498 U.S. 89, 95, 111 S. Ct. 453 457 (1990). Tolling is inappropriate given plaintiff;s conduct, including his refusal to post protective bonds in other forums, instead filing this action based on the same claims. This conduct exemplifies plaintiff's failure to exercise due diligence in preserving his legal rights, and, additionally, his failure to act in good faith regarding these controversies with defendants. ID.; See Request For Judicial Notice.

[6] Section 1334 was amended, effective October 22, 1994, such that subsection (d) cited by parties now appears, unchanged, as subsection (e). Subsection (e) states:

The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate. 28. U.S.C. § 1334(e) (West Supp. 1995).

under plaintiff's former bankruptcy case 8606775 JD. Claim II seeks return of $30,940.87, allegedly constituting property from the same bankruptcy action. Claim III seeks to assert a fraud cause of action, and Claim V purports to assert a breach of the covenant of good faith and fair dealing.

Plaintiff's attempts to pursue these claims, purportedly based on 28 U.S.C. § 1334, in this court is improper for at last two reasons. First, subsection (e) of § 1334 refers to the in rem jurisdiction of a district court or bankruptcy court adjudicating a bankruptcy matter. See In re Becker, 137 B.R. 113, 115 (D.N.J. 1992). On February 7, 1992, the Bankruptcy Court, Central Division of California, dismissed the adversary proceeding filed by plaintiff, referring the action to the state courts, where plaintiff's claims were eventually dismissed. Request for Judicial Notice. There is no ongoing bankruptcy action in federal court at this time. If the plaintiff is dissatisfied with the resolution of his bankruptcy action, his recourse is not to re-plead his claims in district court, but rather to appeal the bankruptcy court's ruling. Dismissal of the claims is appropriate where plaintiff has no pending bankruptcy action, and states none in his Complaint. Second, to the extent that Claims I-III and V are not bankruptcy claims, as the Complaint attempts to establish, but are rather state law causes of action, this court lacks subject matter jurisdiction and they must be consequently dismissed. Fed. R. Civ. P. 12(b)(1).

V.
CONCLUSION

For the foregoing reasons, defendants' motion to dismiss the Complaint is **GRANTED**. Plaintiff's claims are dismissed without leave to amend due to the absence of any indication that plaintiff could replead them successfully. Cf. Schreiber Distributing v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986).

IT IS SO ORDERED

Dated: This 26th day of January, 1996

/s/ George H. King
GEORGE H. KING
United States District
Judge

APPENDIX Y

The Estate of Wayne T. Ziegler
Bankruptcy Case LA 8606775JD
Amended Schedule B
Asset Claims
January 31, 2000

Pre-Petition Asset Claims of the Estate

Cash Property on deposit in Arden-Ethan branch checking account 08090-02646	$ 8,153.20
Cash Property on deposit in Lodi Main branch checking account 01072-03354	$24,453.71
Cash Property on deposit in Noe Valley Branch checking account 02553-09736	$ 6,006.71
Cash Property on deposit in Downey-Paramount branch checking account 05646-03919	$ 917.50
Cash Sale Value of Sailboat Interest	$12,300.00
Total Asset Claims of the Estate	**$51,831.12**

Exhibit 30

The Estate of Wayne T. Ziegler
Bankruptcy Case LA 8606775JD
Amended Schedule A
Liabilities
January 31, 2000

Pre-Petition Claims against the Estate

U.S. Department of Education	$9,496.00
California Franchise Tax Board	$6,207.33
Farmers Insurance Company	$4,806.71
Bernard Nizinski	$1,689.00
Golden Gate University	$1,176.00
R & J Packing & Sales Co., Inc.	$1,258.00
Western Equipment	$ 600.00
Total Claims of Creditors	$25,233.04

Exhibit 30

APPENDIX Z

APPEALS COURT CASE 03-15315
RECORD EXCERPTS
VOLUME 1
TABLE OF CONTENTS

Tab No	Document Description	Trial Court Docket Reference
1	The poem, Tender Bell	Docket No. 3; Plaintiff's Exhibits 1-24, Exhibit 2
2	Reconstructed Bank Statements for the Arden-Ethan account 08090-02646	Docket No. 3; Plaintiff's Exhibits 1-24, Exhibit 6
3	Reconstructed Bank Statements for the Stockton Main account 01543-05306	Docket No. 3; Plaintiff's Exhibits 1-24, Exhibit 9
4	Reconstructed Bank Statements for the Stockton Main account 01547-053308	Docket No. 3; Plaintiff's Exhibits 1-24, Exhibit 10
5	Reconstructed Bank Statements for the Kettleman Lane account 01547-053308	Docket No. 3; Plaintiff's Exhibits 1-24, Exhibit 12
6	Reconstructed Bank Statements for the Lodi Main account 1072-03334 01072-03334	Docket No. 3; Plaintiff's Exhibits 1-24, Exhibit 13

APPEALS COURT CASE 03-15315
RECORD EXCERPTS
VOLUME 1
TABLE OF CONTENTS

Tab No	Document Description	Trial Court Docket Reference
7	Reconstructed Bank Statements for the Lodi Main account 1072-03354	Docket No. 3; Plaintiff's Exhibits 1-24, Exhibit 17
8	The Loan 154-83308 Amortization and Payment History	Docket No. 3; Plaintiff's Exhibits 1-24, Exhibit 18
9	Reconstructed Bank Statements for the Noe Valley account 02552-09736	Docket No. 3; Plaintiff's Exhibits 1-24, Exhibit 20
10	Reconstructed Bank Statements for the Noe Valley account 02553-09736	Docket No. 3; Plaintiff's Exhibits 1-24, Exhibit 21
11	Reconstructed Bank Statements for the Downey-Paramount account 02553-09736	Docket No. 3; Plaintiff's Exhibits 1-24, Exhibit 23
12	Subpoena duces tecum served on the bank's Custodian of Records in June, 1988	Docket No. 3; Plaintiff's Exhibits 1-24, Exhibit 25
13	The forged DMR statement copies supplied for Lodi Main account 1072-03354 in 1988	Docket No. 3; Plaintiff's Exhibits 1-24, Exhibit 26

14	The forged DMR statement copies supplied for Noe Valley account 02553-09736 in 1990	Docket No. 3; Plaintiff's Exhibits 1-24, Exhibit 29

Page Count: 296 Pages

APPEALS COURT CASE 03-15315
RECORD EXCERPTS
VOLUME 2
TABLE OF CONTENTS

Tab No	Document Description	Trial Court Docket Reference
15	Mr. Andreotti's Letter of August 14, 1985, reflecting inflated loan balance	Docket No. 4; Plaintiff's Exhibits 25--55, Exhibit 22
16	The Estate's most recent Amended Asset & Liability Schedules as of January 20, 2000	Docket No. 4; Plaintiff's Exhibits 25-55, Exhibit 30
17	Copy of the first bank statement on the Plaintiff's Employee checking account 03473-08555	Docket No. 4; Plaintiff's Exhibits 25-55, Exhibit 32
18	Copy of letter from former trustee, Ms. Lorraine Loder, attesting to non-appointment	Docket No. 4; Plaintiff's Exhibits 25-55, Exhibit 34
19	Transcript of hearng in the United States Bankruptcy Court on June 25, 1991.	Docket No. 4; Plaintiff's Exhibits 25-55, Exhibit 35
20	Statement copy of the original July 16, 1984, Timesaver statement for for account 1072-03354	Docket No. 4; Plaintiff's Exhibits 25-55, Exhibit 37

APPEALS COURT CASE 03-15315
RECORD EXCERPTS
VOLUME 2
TABLE OF CONTENTS

Tab No	Document Description	Trial Court Docket Reference
21	Court of Appeals opinion in the Consolidated Appeals B071580/ B064366/B065122	Docket No. 4; Plaintiff's Exhibits 25-55, Exhibit 38
22	Ms. Young's letter of January 8, 1992, promising inspection of signature cards	Docket No. 4; Plaintiff's Exhibits 25-55, Exhibit 57
23	Plaintiff's Declaration on Job Responsibilities while employed at Glendale facility	Docket No. 4; Plaintiff's Exhibits 25-55, Exhibit 58
24	Plaintiff's Declaration of Facts discovered while employed by the bank which enabled the recreation of the original bank statements	Docket No. 4; Plaintiff's Exhibits 25-55, Exhibit 59
25	Plaintiff's Letter of September 20, 1990, to the United States Trustee requesting the Appointment of a trustee	Docket No. 4; Plaintiff's Exhibits 25-55, Exhibit 65
26	Plaintiff's Motion to Compel filed in L.A.S.C. Case BC033836	Docket No. 4; Plaintiff's Exhibits 25-55, Exhibit 72

APPEALS COURT CASE 03-15315
RECORD EXCERPTS
VOLUME 2
TABLE OF CONTENTS

Tab No	Document Description	Trial Court Docket Reference
27	Insurance Notices mailed by the bank to the plaintiff attesting to the order of insurance	Docket No. 4; Plaintiff's Exhibits 25-55, Exhibit 82
28	Notice of Cancellation of VSI insurance ordered under loan 154-83308	Docket No. 4; Plaintiff's Exhibits 25-55, Exhibit 83
29	Court's order Granting Defendant's Motion to Dismiss In Part, and granting Plaintiff's Requests for Leave to Amend	Docket No. 42
30	Plaintiff's First Amended Complaint	Docket No. 45

APPEALS COURT CASE 03-15315
RECORD EXCERPTS
VOLUME 3
TABLE OF CONTENTS

Tab No	Document Description	Trial Court Docket Reference
31	Plaintiff's Declaration of Facts leading to the Plaintiff's filing of the Central District Action CV95-2706GHK	Docket No. 56, Plaintiff's Exhibits In Support of Opposition to Motion to Dismiss, Exhibit C
32	Plaintiff's Declaration of Facts Supportive of Amendment of Cause V to cure pleading defects	Docket No. 56, Plaintiff's Exhibits in support of Opposition to Motion To Dismiss, Exhibit E
33	Debtor's First Amended Schedule of Assets and Liabilities filed September 7, 1990	Docket No. 57, Plaintiff's Request to Take Judicial Notice Notice, Exhibit 3
34	The Notice of Appeal	Docket No. 67
35	Trial Court Judgment	Docket No. 66
36	Trial Court Opinion	Docket No. 65
37	Trial Court Docket Sheet	

APPENDIX AA

CODE OF CIVIL PROCEDURE SECTION 391-391.7

391. As used in this title, the following terms have the following meanings:

(a) "Litigation" means any civil action or proceeding, commenced, maintained or pending in any state or federal court.

(b) "Vexatious litigant" means a person who does any of the following:

(1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.

(2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.

(3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

(4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.

(c) "Security" means an undertaking to assure payment, to the party for whose benefit the undertaking is required to be furnished, of the party's reasonable expenses, including attorney's fees and not limited to taxable costs, incurred in or in connection with a litigation instituted, caused to be instituted, or maintained or caused to be maintained by a vexatious litigant.

(d) "Plaintiff" means the person who commences, institutes or maintains a litigation or causes it to be commenced, instituted or maintained, including an attorney at law acting in propria persona.

(e) "Defendant" means a person (including corporation, association, partnership and firm or governmental entity) against whom a litigation is brought or maintained or sought to be brought or maintained.

391.1. In any litigation pending in any court of this state, at any time until final judgment is entered, a defendant may move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security. The motion must be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant.

391.2. At the hearing upon such motion the court shall consider such evidence, written or oral, by witnesses or affidavit, as may be material to the ground of the motion. No determination made by the court in determining or ruling upon the motion shall be or be deemed to be a

determination of any issue in the litigation or of the merits thereof.

391.3. If, after hearing the evidence upon the motion, the court determines that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant, the court shall order the plaintiff to furnish, for the benefit of the moving defendant, security in such amount and within such time as the court shall fix.

391.4. When security that has been ordered furnished is not furnished as ordered, the litigation shall be dismissed as to the defendant for whose benefit it was ordered furnished.

391.6. When a motion pursuant to Section 391.1 is filed prior to trial the litigation is stayed, and the moving defendant need not plead, until 10 days after the motion shall have been denied, or if granted, until 10 days after the required security has been furnished and the moving defendant given written notice thereof. When a motion pursuant to Section 391.1 is made at any time thereafter, the litigation shall be stayed for such period after the denial of the motion or the furnishing of the required security as the court shall determine.

391.7. (a) In addition to any other relief provided in this title, the court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed. Disobedience of the order by a vexatious litigant may be punished as a contempt of court.

(b) The presiding judge shall permit the filing of that litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. The presiding judge may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in Section 391.3.

(c) The clerk may not file any litigation presented by a vexatious litigant subject to a prefiling order unless the vexatious litigant first obtains an order from the presiding judge permitting the filing. If the clerk mistakenly files the litigation without the order, any party may file with the clerk and serve on the plaintiff and other parties a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order as set forth in subdivision (a). The filing of the notice shall automatically stay the litigation. The litigation shall be automatically dismissed unless the plaintiff within 10 days of the filing of that notice obtains an order from the presiding judge permitting the filing of the litigation as set forth in sub division (b). If the presiding judge issues an order permitting the filing, the stay of the litigation shall remain in effect, and the defendants need not plead, until 10 days after the defendants are served with a copy of the order.

(d) For purposes of this section, "litigation" includes any petition, application, or motion other than a discovery motion, in a proceeding under the Family Code or Probate Code, for any order.

(e) The clerk of the court shall provide the Judicial Council a copy of any prefiling orders issued pursuant to subdivision (a). The Judicial Council shall maintain a record of vexatious litigants subject to those prefiling orders and shall annually disseminate a list of those persons to the clerks of the courts of this state.